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No. 85-1878

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; and BOARD OF TRUSTEES OF ALABAMA A & M UNIVERSITY; *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; and BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA; *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERISTY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a case being litigated primarily by or on behalf of two equitably funded state institutions of higher learning seeking enhancement of their budgets and programs through the vehicle of a lawsuit rather than through normal state administrative and legislative processes, lacks such "imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court," rather than after judgment in the Eleventh Circuit Court of Appeals, where the case is now pending?

2. Whether the Eleventh Circuit Court of Appeals properly granted a stay of the proceedings in the district court where the respondent universities (appellants below) in their notices of appeal and motions for a stay demonstrated each of the following: (a) a district court "final decision" or injunctive order sufficient to support an appeal under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1), (b) a likelihood of prevailing on the merits of their appeals, (c) a likelihood of irreparable damage to the respondent universities if the stay were denied, and (d) an advancement of the public interest and lack of harm to the other parties by the granting of the stay?

PARTIES

This respondent, the Board of Trustees of the University of Alabama, agrees with the statement concerning PARTIES on pages ii-iii of the petition except as follows:

1. The petitioners University Legal Defense Fund and National Alumni Normalite Association, support groups of petitioner Alabama A & M University, are not properly before this Court. These groups did not participate in the trial of the case in the district court, and were allowed only limited prospective intervention "for the purpose of providing the [trial court] with their views on any plan of desegregation which may be presented to the Court in the event that the plaintiffs and realigned plaintiffs prevail at trial." *See* Memorandum Opinion and Order Granting Limited Intervention (Nov. 28, 1984) *reprinted at* Appendix 1a-3a. Their status is identical to that of the University of Alabama Huntsville Foundation. The Foundation is a University of Alabama in Huntsville support group which was also granted limited intervention below, but was not allowed to participate at the trial. *See* Memorandum of Opinion Denying UAHF's Motion to Intervene As of Right and Granting Limited Permissive Intervention, and Order (Feb. 25, 1985) *reprinted at* Appendix 4a-9a.

2. In footnote 3 on page iii of the petition, the petitioners have misspelled the names of three of the trustees who sit on the Board of Trustees of the University of Alabama. The correct names of these three trustees are: Winton M. Blount, Frank H. Bromberg, Jr. and Sandral Hullett.

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Respondent Board of Trustees of the University of Alabama disagrees with petitioners' characterizations of this case and the orders and judgments below.

This case, as it has evolved to this stage, is not a "school desegregation case" in the traditional sense of the phrase, as claimed by the petitioners. It is true that the United States originally filed this action on July 11, 1983, seeking to eliminate all vestiges of an alleged dual system of higher education in the state. However, since

the district court allowed petitioners and former defendants Alabama A & M University and Alabama State University to realign themselves as plaintiffs in the case at an early stage, the suit has focused on their claimed institutional rights to enhancement, based on the alleged liability under Title VI and the Fourteenth Amendment of the other defendants described in the petition. There is no evidence in the record below that any of the institutional defendants have denied access to or discriminated against any student based on race within the last twenty years. Indeed, the evidence demonstrates that the University of Alabama System[1] enrolls more black students than either of the universities operated by the petitioners, and that there are significantly more black students attending predominantly white public universities in Alabama than collectively attend the two predominantly black universities operated by petitioners. *See* Alabama A & M Exhibits 203-234 summarized on table *reprinted at* Appendix at 10a.

Additionally, it is undisputed in the record that this respondent has affirmative action programs on each of its three campuses, is itself a biracial governing board, and that the number of minority faculty members on each of its campuses is within two standard deviations of what can be expected given the available numbers of minority persons nationwide with appropriate degrees in the respective fields in which its faculty are hired. *See* Testimony of Bernard Siskin at Appendix 11a-16a.

Additionally, this respondent, for the reasons set out below, disputes the assertion by petitioners that the opinion and order of the district court made on December 7,

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[1] The University of Alabama System, which is operated by this respondent, is composed of three campuses, The University of Alabama, located in Tuscaloosa, Alabama, frequently referred to as UA, the University of Alabama at Birmingham, frequently called UAB, and the University of Alabama in Huntsville, also known as UAH.

1985, entered on December 9, 1985, and subsequently modified on January 17, 1986, on which respondents' appeal to the circuit court of appeals is based, is "non-final." This issue is now being briefed by the respondents for consideration in the Eleventh Circuit Court of Appeals.

JURISDICTION

This respondent does not dispute the jurisdiction of this Court to act on the petition in this case.

STATUTES AND RULES INVOLVED

In addition to the statutes quoted by petitioners, the respondents submit that Rule 18 of this Court is particularly relevant to this petition:

> Rule 18. *Certiorari to a federal court of appeals before judgment.*
>
> A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952); *Wilson v. Girard*, 354 U.S. 524 (1957); *United States v. Nixon*, 418 U.S. 683 (1974).

STATEMENT OF THE CASE

One of the most cogent statements in the petition is its admission that "this is an unusual stage at which to seek review in this Court . . . ." Petition at 4. The unusualness and irregularity of this request by the peti-

tioners for Supreme Court review at this stage of the case is highlighted by the decision of the United States, not to join the petitioners in objecting to the stays issued by the court of appeals, and by its decision not to join the petitioners in filing this premature petition for writ of certiorari.

This suit was filed on July 11, 1983, by the United States based upon alleged violations of the named defendants, including the petitioners, of Title VI of the Civil Rights Act of 1964 [2] and the Fourteenth Amendment.

In the early 1970's, Judge John H. Pratt of the United States District Court for the District of Columbia ordered the Department of Health, Education and Welfare and its Office of Civil Rights, to begin Title VI compliance proceedings against ten states,[3] which became known as the *Adams* states.[4] Alabama was not among the *Adams* states.

However, in 1978, the Office of Civil Rights began a "compliance review" of Alabama public institutions of higher education, and on January 7, 1981, issued a "Letter of Findings" requesting that the State submit a plan to eliminate alleged remaining vestiges of segregation existing in the state senior institutions of higher education.[5] When a plan acceptable to the Department of

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[2] 42 U.S.C. §§ 2000d and 2000d-1 (1982).

[3] These ten states were: Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania and Virginia.

[4] *See Adams v. Richardson*, 356 F.Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973). *See also Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).

[5] In the District Court this respondent raised as a defense the failure of the United States to follow the requirements of Title VI and the regulations issued thereunder before filing this suit. This defense is one of the issues being argued below. The respondents also dispute many of the conclusions in the "Letter of Findings".

Education was not submitted, it referred the matter to the Department of Justice and this case resulted.

Not until 1983, after this case was filed by the United States, did these petitioners surface with their "claims" asserted in this case.[6]

Petitioners have accurately described the extensive discovery preceding the July 1985 trial in the district court and its December 7, 1985, opinion and order, which is reprinted in the appendix to the petition. They also attempt to buttress their unusual petition by quoting a sentence from this respondent's 1292(b) motion describing the December 7 order as interlocutory. Petition at 7. The sentence quoted is taken out of context. Given (a) the unnecessary procedural complexities of the case caused by the realignment of two of the petitioners (and original defendants) as plaintiffs, (b) the bifurcation of the trial of the case, (c) the allowance of intervention as plaintiffs of the Knight petitioners, and (d) the findings and conclusions made by the district court which this respondent contends were clearly erroneous, this respondent concluded that prior to filing a notice of appeal, an attempt should be made to obtain from the district court permissive appellate review of the controlling questions of law in the case. Moreover, in that same motion for a certification by the district court which was filed on December 17, 1985, this respondent noted that "this order may be appealable as of right . . ." *See* Motion to Amend

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[6] Petitioner Alabama A & M University moved for realignment as a plaintiff on July 25, 1983, and petitioner Alabama State University filed a similar motion on August 5, 1983. Both motions were granted by the district court on September 26, 1983. The Knight petitioners, who were also parties to a previously filed lawsuit in the Middle District of Alabama, *Knight v. James*, 81-H-0052-N (M.D. Ala. filed June 15, 1981), and who have made claims in both suits limited to the Montgomery, Alabama, area where Alabama State University is located, filed a motion to intervene in the district court in this case on September 15, 1983, which was granted on April 18, 1984.

Interlocutory Order to Include Statement Prescribed by 28 U.S.C. § 1292(b) and To Allow an Immediate Appeal and Motion For a Stay" (Dec. 17, 1985) *reprinted at* Appendix 17a-24a.

After this and similar motions filed by other respondents were overruled, on February 5, 1986, both this respondent and respondent Auburn University filed notices of appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a). *See* Notices of Appeal *reprinted at* Appendix 25a-51a. Other respondents also filed notices of appeal.

Thereafter, on February 13, 1986, this respondent filed its Motion for a Stay with the Eleventh Circuit Court of Appeals. *See* Motion for a Stay of the District Court Memorandum of Opinion and Order Pending Appeal *reprinted without exhibits* (except for affidavit of John C. Wright) *at* Appendix 52a-71a. A similar motion was filed by respondent Auburn University on February 12.

Both motions for stays were granted by the Eleventh Circuit Court of Appeals on February 14, 1986, the day a state "plan" was due to be filed with the district court. The petitioners' motions to dissolve the stays have been overruled, and their motions to dismiss the appeals "carried with the case." *See* Petition at 8a.

On May 16, 1986, the certified record of 180 volumes along with 33 boxes of exhibits were sent by the district court clerk to the circuit court clerk, and on June 11, 1986, a tentative briefing schedule in the court of appeals was established. *See* Memorandum To All Counsel from Spencer D. Mercer, Clerk (June 11, 1986) *reprinted at* Appendix 72a-74a.

Meanwhile, on June 6, 1986, the Eleventh Circuit Court of Appeals handed down a decision in the State Board of Education appeal referred to in footnote 5 on page 9 of the petition. In this opinion, written by Judge Frank M. Johnson, Jr., it was held that petitioner Alabama State

University has no right to sue the State of Alabama under Title VI, the Fourteenth Amendment or Section 1983. See *United States v. Alabama*, No. 85-7582 (11th Cir. June 6, 1986) *reprinted at* Appendix 75a-89a. This holding strongly supports the position of the respondents that petitioners Alabama State University and Alabama A & M University were improperly realigned as plaintiffs in the district court in this case. Further, the special concurring opinion perceptively recognizes that this case has evolved into one primarily seeking massive revenue and program enhancement on behalf of two state universities which have no legal right to do so. *See* Appendix 89a.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because this case is pending in a federal court of appeals, before judgment, and is not of such imperative public importance as to justify deviation from normal appellate practice. Further, when this case's unique facts and procedural posture are considered, the granting of a discretionary stay by the circuit court of appeals does not conflict with decisions of this Court or other courts of appeals, because it is designed to prevent irreparable injury to the respondents pending appeal and does no harm to petitioners.

By filing this petition at this stage of the Eleventh Circuit appeal, petitioners are requesting this Court to decide an issue—appealability of the district court's December 7, 1985, Opinion and Order—that the Eleventh Circuit has expressly left open for decision in the future.[7]

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[7] In the Eleventh Circuit's March 20, 1986, orders, reprinted at page 8a of the petition, the court expressly declined to rule on the petitioners' motions raising the issue of appealability of the December 7, 1985, district court opinion and order, but instead "carried" them "with the case", thus reserving the issue for decision after the record is filed, and briefs on the merits of the case are submitted.

It is simply not true, as asserted in petitioner's footnote 6 on page 11 of the petition, that this issue has been decided by the appeals court by its issuance of the stay orders.[8]

The cases cited on page 10 of the petition[9] do not support the granting of the writ. Each of these cases involved both (a) Government appeals from district court rulings on motions to suppress in criminal cases, and (b) express rulings by the courts of appeals on the subject of jurisdiction to hear the appeals. Here, as indicated above, the Eleventh Circuit has not yet ruled on the question of appealability of the December 7, 1985, district court opinion and order.

Petitioners make no real argument that this case is of such imperative public importance as to justify deviation from normal appellate practice other than an unsupported claim that "allowing this appeal to be maintained and to be effectuated by staying all district court proceedings seriously injures the petitioners." Petition at 10.[10]

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[8] This assertion by the petitioners cannot withstand close scrutiny. It is ironic that the linchpin of their argument for granting the writ masks a request to the Court to do precisely that which they complain of below, namely to hear an appeal of an interlocutory ruling.

[9] *See Carroll v. United States*, 354 U.S. 394 (1957); *DiBella v. United States*, 369 U.S. 121 (1962).

[10] Petitioners also claim conflict between the orders granting the stay and national policy for swift pursuit of school desegregation. As mentioned above, when petitioners' claims for massive enhancement of facilities and programs are examined in light of the racial integration of the respondent institutions and the significant differences between elementary-secondary education and higher education are noted, it is clear that this suit bears little relation to the elementary-secondary school desegregation cases which have articulated national policy for speedy desegregation.

The record below, and the public appropriations acts of the Alabama Legislature, conclusively demonstrate that petitioners Alabama State University and Alabama A & M University have been equitably funded under the state appropriations process for many years, and are not being injured by the stay granted by the Court of Appeals. For example, petitioners Alabama A & M University and Alabama State University have for the past two years had higher percentage increases in appropriations from the Alabama Special Education Trust Fund than any of the other twelve senior institutions in Alabama. Similarly, an analysis of appropriations for the past five years places the petitioners near the top of the list of fourteen senior institutions. *See* Table of Analysis of Appropriations from the Alabama Special Education Trust Fund for 14 Senior Institutions *reprinted at* Appendix 90a.[11] Likewise, a comprehensive study of the facilities at a peer group of seven similar Alabama public institutions,[12] which was introduced as UAS Exhibit 1034 at the trial, demonstrates that petitioners Alabama A & M University and Alabama State University have been equitably treated over the past fifteen years in capital appropriations and higher education bond issues, and that no vestiges of any prior alleged racial discrimination in these areas were found to exist. See Excerpts from Facility Management Institute Report, Trial Court Exhibit UAS 1034, *reprinted at* Appendix 91a-107a.

It is especially noteworthy that there is no claim in the petition of any injury to *students* attending either

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[11] This analysis treats as a separate category appropriations for the Agricultural Experiment Stations and the Cooperative Extension Service administered by Auburn University.

[12] These institutions are: Alabama A & M University, Alabama State University, Auburn University at Montgomery, Jacksonville State University, Troy State University, the University of Alabama in Huntsville, and the University of North Alabama.

Alabama State University or Alabama A & M University resulting from the stay. This omission highlights the institutional nature of the claims of the petitioners.

Thus, when measured against the types of cases of imperative public importance which the court cites in Rule 18 as justifying deviation from normal appellate practice and meriting immediate consideration by this Court, it is clear the instant case falls far short of the mark.[13]

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[13] *See United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (certiorari granted because of similar or identical issues of importance already pending before the Court); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (certiorari granted because there were no serious or difficult questions of fact involved and the requisite importance of an early and final decision concerning the constitutionality of the Railroad Retirement Act was found); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (certiorari granted because it would have been impossible to recover taxes paid under the statute whose constitutionality was being challenged); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (certiorari granted in conjunction with several other suits challenging the constitutionality of the same act); *Ex parte Quirin*, 317 U.S. 1 (1942) (certiorari granted where several actions were brought involving violations of the law of war and Articles of War because of the importance of preserving civil liberty safeguards in time of war); *United States v. Mine Workers*, 330 U.S. 258 (1948) (certiorari granted because of public interest; the case involved a strike that resulted in mines furnishing the major part of the nation's bituminous coal being idled); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (certiorari granted to review Executive order calling for the seizure of the nation's steel mills in order to avoid a strike that would likely jeopardize the national defense because of the necessity of steel for weapons and war materials); *Wilson v. Girard*, 354 U.S. 524 (1957) (certiorari granted to review a denial of a writ of habeas corpus and issuance of declaratory and injunctive relief in an issue arising out of a security treaty between Japan and the United States); *United States v. Nixon*, 418 U.S. 683 (1974) (certiorari granted because of the public importance of the issues presented and the need for their prompt resolution; the issue arose from a subpoena directing the President to produce certain tape recordings and documents relating to conversations with aides and advisers).

I. The Issue of Whether The December 7, 1985, District Court Memorandum of Opinion and Order Will Support An Appeal Under Either 28 U.S.C. § 1291 or § 1292(a) Has Not Been Decided By The Court of Appeals and at This Stage There Can Be No Conflict With Any Decision of This Court or Other Courts of Appeals Which Can Be Used to Justify Granting the Writ.

As pointed out above, the Court of Appeals for the Eleventh Circuit has not yet ruled on petitioners' motions to dismiss the appeals which have been carried with the case. Thus, petitioners' argument on pages 11-17 of the petition that the court of appeals' actions conflict with decisions in this Court and in other courts of appeals concerning finality of judgments is neither pertinent nor correct.

However, as is more fully set out in respondent Auburn University's Notice of Appeal which is *reprinted at* Appendix 26a-51a, respondents assert that the December 7, 1985, Memorandum of Opinion and Order taken together constitute a "final decision" within the meaning of 28 U.S.C. § 1291 because their practical effect is to decide all of the significant issues in the present case. Alternatively, if the order is considered interlocutory, it is, with respect to the institutional respondents, a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1) because it specifies all of the critical elements to be addressed by the plan submitted by the state defendants, and prohibits the institutional respondents from any effective participation in preparing the plan which may adversely affect them.

II. The Court of Appeals' Stay Orders Were Justified Under the Particular Facts of This Case, and Do Not Conflict with Decisions of This Court or Other Courts of Appeals.

As is the case in many areas of the law, whether an appellate court should grant a stay of a judgment of a lower court pending an appeal is an intensely factual

question involving the careful balancing of various interests. Because of the nature of the judicial process, frequently decisions involving stays must be made quickly, to avoid irreparable harm to an aggrieved party and to preserve the status quo pending the appeal. As this Court has stated:

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.

Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 9-10 (1942).

Four factors have been articulated as relevant for determining when a stay should be issued: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

This respondent, with a supporting affidavit from one of its campus presidents, has demonstrated to the court of appeals why a stay should be granted in this case, pending appeal, and has satisfied each of the above elements in its motion and supporting exhibits. *See* Motion For a Stay *reprinted at* Appendix 52a-71a. Thus, the Eleventh Circuit Court of Appeals clearly acted with-

in the scope of its authority and in accordance with Federal Rule of Appellate Procedure 8 when it granted the stays in this case.

Petitioners did not look far enough when they asserted on page 17 of the petition that they were "unaware of any authority in any court in support of an order staying proceedings at this stage in a school desegregation case." Justice Black, acting as Circuit Justice, did just that in *Corpus Christi School District v. Cisneros*, 404 U.S. 1211 (Black, Circuit Justice 1971), where a district judge's order in a school desegregation case was stayed because it was "apparent that this case is in a state of confusion and presents questions not heretofore passed on by the full Court, but which should be." 404 U.S. at 1211. The stay was granted pending action on the merits in the Fifth Circuit or action by the full Court. The instant case, although not a traditional school desegregation case for the reasons heretofore explained, certainly is in a "state of confusion" and presents questions never fully ruled upon in this Court.[14]

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[14] Although this Court stated shortly after *Brown v. Board of Education*, 347 U.S. 483 (1954) that it did not mean to imply "that decrees involving graduate study present the problems of elementary and secondary schools", *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956), it has never fully discussed the differences between elementary and secondary school cases, and the unique problems of higher education desegregation. The closest this Court apparently has come to considering this issue is in its affirmance without opinion of the case of *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969). In the district court opinion written by Judge Frank Johnson, a three judge panel concluded that as long as an institution of higher education has nondiscriminatory admissions and hiring policies, and "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90. The court, noting the necessity for different legal stand-

Other more recent cases where stays have been granted in school desegregation proceedings include, *Pasadena City Board of Education v. Spangler*, 423 U.S. 1335 (Rehnquist, Circuit Justice 1975); *Columbus Board of Education v. Penick*, 439 U.S. 1348 (Rehnquist, Circuit Justice 1978), *vacated*, 443 U.S. 916 (1979); and *Metropolitan County Board of Education v. Kelley*, 453 U.S. 1306 (Stevens, Circuit Justice 1981).

Further, a "stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case." *Garcia-Mir v. Smith*, 105 S.Ct. 948 (Rehnquist, Circuit Justice 1985). *See also Bonura v. CBS, Inc.*, 459 U.S. 1313 (White, Circuit Justice 1983). This has been particularly true in the area of civil rights law. Both the Fifth and Eleventh circuits have proved themselves to be sensitive to society's

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ards to be applied between elementary-secondary education and higher education, reasoned that as far as college admissions are concerned, unlike elementary and secondary education, higher education is neither free nor compulsory, and freedom to choose where one will attend college performs the important function of fitting the right school to the right student. In dissenting from the affirmance of this opinion by this Court, Justice Douglas recognized the import of this decision by saying: "The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on the one hand and colleges and universities on the other." 393 U.S. at 401. Likewise, the Fifth Circuit has stated: "Well established principles of public school desegregation have not been applied generally to institutions of higher learning in the same manner in which they have been applied to public schools below the college level." *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971). The district court in this case refused to apply the *ASTA* standard. *See* Petition at 84a-87a. Likewise, the Eleventh Circuit opinion in the State Board of Education appeal in this case decides issues apparently never raised in this Court and increases the likelihood that the institutional petitioners herein will be realigned as defendants. *See United States v. Alabama*, No. 85-7582 (11th Cir. June 6, 1986) *reprinted at* Appendix 75a-89a.

needs in this field. In an article published just prior to the reorganization of the Fifth Circuit into the new Fifth and Eleventh Circuits, Dean Frank T. Read of Indiana University School of Law wrote that, "no court in this nation's history has had a more direct and continuing commitment to any human rights issue than has the Fifth Circuit, and those federal district judges who followed its lead." Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 Mercer L. Rev. 1149, 1165 (1981).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied, along with petitioners' requests to dissolve the stays entered by the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM OPINION AND ORDER
GRANTING LIMITED INTERVENTION

Petitioners University Legal Defense Funds ("ULDF") and National Alumni Normalite Association ("NANA") seek intervention in this action so that they may ". . . give their input in any and all programs which may be devised to comply with the requests of the Complaint, for all such proposals would have a direct bearing on [them]."

ULDF is a non-profit corporation whose mission is, among other things,

> ". . . to secure financial compensation for Alabama A & M as a result of past years of discrimination funding, and to insure that Alabama A & M maintains its identity as a predominantly black institu-

tion, while at the same time making its resources available to all qualified persons without regard to race, color, or creed."

NANA is an organization of alumni of Alabama A & M University, ("A&M") with a mission similar to that of ULDF.

Petitioners are not entitled to intervene as of right, because they have neither established an unconditional statutory right of intervention, nor have they established that any of their legally cognizable rights are inadequately represented by the existing parties.

However, the petitioners' claims include factual and legal questions common to those raised by the plaintiff and the re-aligned plaintiffs. To the extent that those questions relate to alleged statutory and constitutional violations, unrestricted intervention will unduly delay the adjudication of the rights of the original parties, since a trial date has already been set. More importantly, as to these alleged violations, petitioners' interests are co-extensive with those of A&M, a party to this action; and those interests are being adequately protected by A&M.

If the plaintiff and the re-aligned plaintiffs prevail in this action, it appears to the Court, in the exercise of its discretion, that ULDF and NANA should be heard on any proposed plans of desegregation. Accordingly, their intervention in the action should be limited to that of presenting to the Court their views, by testimony or otherwise, on any proposed plan of desegregation which involves A&M, should this case reach that post-trial stage.

It is therefore ORDERED that the University Legal Defense Fund and the National Alumni Normalite Association be granted limited intervention in this cause, for the purpose of providing the Court with their views on any plan of desegregation which may be presented to the

Court in the event that the plaintiffs and the re-aligned plaintiffs prevail at trial.[1]

DONE this 28th day of November, 1984.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

[1] Counsel for ULDF and NANA need not be served with papers hereinafter to be filed in this case, other than this order, unless and until the Court renders a decision in favor of plaintiff and re-aligned plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

ORDER

For the reasons stated in the accompanying Memorandum of Opinion, the Petition of the University of Alabama Huntsville Foundation To Intervene As of Right is DENIED; and limited permissive intervention is GRANTED.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 25, 1985]

MEMORANDUM OF
OPINION DENYING UAHF'S MOTION TO
INTERVENE AS OF RIGHT AND GRANTING
LIMITED PERMISSIVE INTERVENTION

On January 9, 1985, petitioner University of Alabama Huntsville Foundation (UAHF) sought leave to intervene as of right in this action. It asserts that it has an interest in the University of Alabama at Huntsville (UAH), a predominately white institution of higher learning; that the disposition of the action may impair or impede its ability to protect that interest, and that its interests are not adequately represented by existing parties. For the reasons which follow, the Court finds and concludes that the petition is due to be denied.

UAHF is a private, nonprofit corporation. Its origins date back to 1962, when a "Research Sites Foundation, Inc." was incorporated for "[t]he sole purpose of . . .

serv[ing] in any and all possible ways the interest of the University of Alabama Research Institute at Huntsville, Alabama." The predecessor of UAH, the Alabama Research Institute at Huntsville, was established in the same year. In 1964, the corporation assumed its present name. Since 1980, the Board of Directors of UAHF has included the Chancellor of the University of Alabama System, the President of the University of Alabama in Huntsville, and the members of the Board of Trustees of the University of Alabama residing in the Congressional District in which the University of Alabama in Huntsville is located.

Over the years, UAHF has made substantial contributions to UAH, consistent with its mission. It has contributed, or obligated itself to contribute, nearly $750,000 to UAH. It owns virtually all of the land in Research Park, the center of high tech development in Huntsville; and it is the principal land owning corporation in the area providing reasonably priced commercial sites.

However, despite its money and its mission, UAHF has no legally cognizable property rights in UAH.[1]

UAH was admittedly created by the unilateral action of the Board of Trustees of the University of Alabama, a defendant in this action. It is and has always been under the direction and control of that Board of Trustees. UAHF does not decide or dictate the curricula or course or program offerings at UAH; it does not approve its budget; it does not hire or fire its president, faculty, or staff; it does not own the property on which UAH sits; it does nothing more than its articles of incorporation require: it provides *support* for UAH, and that support

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[1] The Court recognizes that interests in property are not essential to intervention as of right, *Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co.*, 386 U.S. 129 (1967), but "interests in property are the most elementary type of right that Rule 24(a) is designed to protect . . ." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970).

is substantial. On the other hand, UAH has no control over UAHF. It lacks authority for example, to demand current income or past accumulation of income from UAHF, albeit that such income exists for the benefit of UAH.

UAHF's sole *raison d'etre* is to provide funds to benefit UAH. Its interests lie in the continued existence of UAH as an institution. None of the parties, including A & M, have suggested that UAH be dismantled. So long as UAH remains an institution, the disposition of this action will not, as a practical matter, impair or impede UAHF's mission. Contrary to its argument, UAHF will not be bound by a judgment on the liability aspects of this case. It will remain free to continue its vigorous support of UAH.

The law of this circuit is that

> Intervention of right must be supported by "direct, substantial, legally protectible interest in the proceeding. *Howse, supra,* 641 F.2d at 302-21, *Piambino v. Bailey,* 610 F.2d 1306, 1321 (5th Cir. 1980); *United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir. 1978); *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir. 1970); *see Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed. 2d 580 (1971) ("significantly protectible interest"). *In essence, the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. See Piambino, supra,* 610 F.2d at 1321; *United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir. 1969).

Athens Lumber Co., Inc. v. Federal Elections Com'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (emphasis added). In no wise can UAHF be said to be a real party in interest in these proceedings.

UAHF has been aware of the pendency of this action since it was initially filed. At least one of the members of its Board of Directors is already a defendant in this case by virtue of his or her membership on the Board of Trustees of the University of Alabama and residence in the Congressional district in which UAH is located. In November, 1984, realigned plaintiff Alabama A & M University ("A&M"), the century-old predominately black institution of higher learning also located in Huntsville, filed a statement of its position. In that statement, A & M set forth its contentions concerning liability and relief. Alarmed at the relief requested by A & M insofar as the granting of such relief would affect existing and planned programs at UAH, UAHF filed this intervention petition on January 9, 1985. It should have been aware, from the outset of this litigation, that if liability were established, possible relief might affect existing and planned UAH programs and course offerings.

As of the date on which UAHF initially filed its intervention papers, the file in this case consisted of four volumes of pleadings and 35 volumes of discovery. Numerous depositions had been completed; others had been noticed. A pretrial conference had already been held; the principal pretrial conference was only three weeks away.

Counsel for the parties were, at that time and they remain to this date, consumed in their preparations for trial, for they were informed last fall that the case would be tried not later than the summer of 1985.

Upon consideration of the factors enumerated in *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977), the Court finds that the intervention petition is untimely.

On the issues of whether the State of Alabama and its agents, agencies, and institutions have ever operated a dual system of higher education in Huntsville, Alabama; and, if so, whether that system and its vestiges have been eliminated, such interests as UAHF may possess are ade-

quately represented by the Board of Trustees of the University of Alabama. Indeed, those issues are vigorously being litigated by counsel; for the said Board of Trustees, as they properly should be, for the decisions and actions under challenge here are not those of UAHF; rather, they are decisions and actions of the University of Alabama Board of Trustees and the other named defendants.

UAHF is not liable for any of these decisions and actions; its incentive to litigate is not nearly as pressing as that of the Board of Trustees of the University of Alabama.

For all of these reasons, UAHF is not entitled to intervene as of right.

UAHF also seeks permissive intervention. For the reasons set out in the earlier part of this opinion, the Court finds and concludes that unlimited permissive intervention will unduly delay the adjudication of the rights of the original parties to these proceedings. Accordingly, UAHF will be granted a limited intervention—on the same terms and conditions as those previously imposed on putative interventors University Legal Defense Fund and the National Alumni Normalite Association.

By separate order, the petition to intervene as of right will be denied.

DONE this 25th day of February, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. CLEMON

TRIAL EX. NO.	SCHOOL	UNDERGRAD - FULL			GRADUA
		Blk	Whi	Tot.	Blk
A&M 205	A&M **	2527	22	2953	98
A&M 208	AU *	467	14776	15426	30
A&M 209	AUM *	613	2804	3459	25
A&M 206	ASU **	3037	4	3102	99
A&M 210	JSU *	774	3473	4386	9
A&M 211	LU *	419	717	1145	11
A&M 213	TSU *	672	2668	3398	13
A&M 216	TSUM*	95	164	269	40
A&M 218	UA *	1179	9616	11102	52
A&M 219	UAB *	1325	4000	5449	53
A&M 234	UAH *	172	2372	2643	7
A&M 212	UM *	199	1769	2037	1
A&M 220	UNA *	337	3474	3844	-
A&M 203	USA *	630	4732	5851	23

UNDERGRADUATE
(Full-time)
Blacks at TBI's - 5,564 = 44.71%
Blacks at TWI's - 6,882 = 55.29%
Total Blacks - 12,446

(Part-time)
Blacks at TBI's - 486 = 20.95%
Blacks at TWI's - 1,834 = 79.05%
Total Blacks - 2,320

HEGIS 1984 FALL ENROLLMENT

E - FULL		UNDERGRAD - PART			GRADUATE - PART			TOTAL HEADCOUNT		
hi	Tot.	Blk	Whi	Tot.	Blk	Whi	Tot.	Blk	Whi	Tot
26	376	217	16	253	197	174	463	3089	249	4109
499	658	28	1071	1112	37	801	972	586	17810	18888
128	157	84	697	873	35	248	286	827	4195	5084
3	105	269	3	277	64	3	67	3694	17	3786
59	91	226	1136	1418	49	442	507	1070	5231	6564
34	45	48	71	119	38	120	158	523	968	1500
61	76	123	461	607	49	156	206	868	3392	4344
142	198	272	979	1296	74	155	235	502	1516	2096
842	1058	49	1399	1515	86	1287	1423	1392	13642	15626
773	915	574	2863	3484	81	817	914	2417	10757	13517
161	250	96	1768	1904	16	492	543	319	5264	5863
42	44	11	221	233	20	211	235	257	2446	2782
14	18	65	556	628	15	437	454	433	4714	5197
283	353	258	1771	2100	48	525	587	977	7731	9342

GRADUATE

(Full-time)

Blacks at TBI's - 197 = 42.73%
Blacks at TWI's - 264 = 57.27%
Total Blacks 461

(Part-time)

Blacks at TBI's - 261 = 32.26%
Blacks at TWI's 548 = 67.74%
Total Blacks 809

*ALL SCHOOLS EXCEPT TBI'S

**TBI

Part of Testimony of Dr. Bernard Siskin

August 1, 1985

* * * *

[7461] A. When looking at the faculty or any employment process, and one wants to develop a bench mark for the institution, there are standard statistical procedures which one does, which is to go out and define what is a relevant labor market and determine, given that relevant labor market, what proportion of persons in that labor market have the requisite skills to be hired, to be considered for being hired; and then under the assumption that everybody in the pool has equal probability of being interested in the position, applying for the position and being hired, whether they are black or white, one can get an expected percent black for the school. And that you would expect to differ by institutions because of clearly two obvious factors, one being different degree requirements. There is a different pool for Ph.D. faculty than [7462] there is for non Ph.D. faculty, and there's a different racial mix in the labor market of those containing two Ph.D.s which total—

MR. WHATLEY: I object to—

MR. WATKINS: Object to this line. This is outside his area of expertise. He's not an expert on labor availability of the pool. He can describe a method, a statistical method and whether that method is acceptable for measuring, but he's not an expert on labor pools and hasn't been offered as an expert on labor pools.

MR. CRENSHAW: Your Honor, we think is he and we thought he was offered in that regard.

MR. POWELL: I thought he was too, Your Honor. I'll be glad to—if there's any question about it, he's eminently qualified in labor employment discrimination.

THE COURT: Objection is overruled.

Q. (BY MR. POWELL:) Go ahead, Dr. Siskin.

A. Secondly, that there is a vast—as I was saying, for instance, the Ph.D. market overall would be a roughly

around three point six to four percent, somewhere in that range, [7463] black. The master's market is much higher and the bachelor's level is much higher, and moreover that's been changing over time, the percent black, percent minority in the Ph.D. level has been increasing over time.

You would also see major differences in percent black among Ph.D.s by field. They tend to be very small percentages in engineering, larger percentages in some of the humanities and social sciences. So you see vast differences by field, and these are the type things that will have to be adjusted for to come up with a standard to judge a faculty to determine whether or not it is underutilized.

Q. Did you do such an analysis or test for the University of Alabama, University of Alabama in Birmingham and University of Alabama in Huntsville?

A. Yes, I did.

Q. How and with what results?

A. What I did here was a bench mark analysis. It's different from what I would do say if I were doing a hiring analysis. Pools would be different. Okay. Because hiring, you would be drawing from a more recent pool and a [7464] different type of pool than when you're doing a bench mark.

For a bench mark study, what I did was first define the labor market. The labor market for all of these institutions, my understanding, is a national recruiter—

* * * *

[7465] Q. (BY MR. POWELL:) Would you continue, Dr. Dentler—I mean, Dr. Siskin, if you remember where you were?

[7466] A. Yes. The pools I used were national recruiting pool for faculty. What I did was I asked the universities to give me a list of their faculty by department and by degree and by race, but I was only real interested in the total for the race.

I then used the following data sources to compare what should be. For departments where there were predominantly Ph.D. degree holders, that is, where you might

have a department which had ten Ph.D.s and one non-Ph.D., I assumed that the one non-Ph.D. in that circumstance was probably an APD type instructor and the appropriate pool for that person would really be the Ph.D. pool.

I've compared those against the tabulated Ph.D.s granted by subspecialty area, matching the specialty area degree with the granted degree, data which is published by the National Center for Educational statistics compiled by the National Resource Council and published in one composite document by the University of Colorado, Department of Human Resources, affirmative action.

What that gives you is the percent [7467] black in specific fields of degree holders, two periods, '73 to '82 in most cases, and in certain cases '77 to '82. The distinction is essentially one that the earlier data was not always broken down in the same detail as the later data. For certain specialties, you can't get the earlier data.

In terms of its impact on the analysis, it shouldn't have any impact of anything, it should be conservative to the university in the sense that the percent black from '77 to '83 should be higher if you had the earlier period of data.

For those cases where the terminal degree was not a Ph.D., such as library science, I got from the Scientific Manpower Commission data percents offered in master's degrees and used that as the data.

For departments where there was a mix, and it wasn't clear that the Ph.D. was a necessary full requirement, for instance, a department which had eight Ph.D.s and five master's, non-Ph.D.s, I used the weighted average of the pools between the Ph.D. pool for the eight and the master's pool for the five.

[7468] For medical faculty, I used the—there are no degree specials in medicines, so what I was able to get was data from the Scientific Manpower Commission listing the racial mix of faculty in medical schools in the whole United States and used that as the bench mark figure, and that's by subspecialty area.

If you do that, I found the following: For the University of Alabama, the data which I was given—and I restricted myself to full-time permanent faculty. I excluded permanent part-time faculty that I was given, the reason being permanent part-time faculty typically is not drawn from a national pool, they tend to be local people with other jobs and, therefore, it's not an appropriate pool to use for those. And I eliminated temporary appointments because that would again not be an appropriate pool I think in terms of comparing the numbers.

For the University of Alabama, I found that they had reported sixteen black faculty, permanent full-time faculty.

* * * *

[7470] Q. (BY MR. POWELL:) Would you go ahead and give your numbers, Doctor?

A. What I found was, at the University of Alabama, based upon the pools, if you randomly selected from the labor markets, assuming that blacks and whites in the labor market had equal probability of applying and equal chances of being selected, you would have expected twenty-three point six black faculty on the campus of the University of Alabama. There are sixteen. That gives you a shortfall of roughly seven and a half people and that represents one point five nine standard [7471] deviations from the norm.

For the University—

Q. Excuse me, did you say how many faculty, the total faculty?

A. Total faculty was seven hundred fifty-five faculty.

Q. Okay.

A. Now, I did one other calculation from this. One of the problems—and the only department that I had problem with in terms of availability in terms of interpretation was the nursing, and that was common, it is not clear to me from my experiences, and from discussions here, to recruit nurses, even in the nursing schools generally, from the national pool. It tends to be much more

local pool. You cannot get data on a local level for nursing pool because data doesn't exist as of yet with degree, related to degree. Eventually the census will put it out, but had not yet at that time.

THE COURT: The Labor Department doesn't report it?

A. They report nurses, but they don't report nurses with degrees and nurses with master's degrees. Therefore, almost all the [7472] faculty had master's degrees in nursing and it's clearly a different pool. On the national level, you can get figures for Ph.D.s in nursing, master's in nursing, and bachelor's in nursing, and nurses without degrees, four-year degrees. You can't get it yet on a local level.

What I did simply was I eliminated the nursing school and recalculated the numbers to see what impact that would have.

At UAH, if you do that—I mean, University of Alabama, the sixteen faculty falls to fourteen because two of the black faculty are nurses. The expected falls to twenty-two point one. The shortfall goes up slightly to eight. And the standard deviation goes to one point seven five.

At UAB, what I found was thirty-two faculty of black out of one thousand three hundred thirty-six that were reported to me. You would expect thirty-four point one to be black. Shortfall of only two faculty. That represents zero point three six standard deviations.

If you move—

Q. And if you do it without nurses at [7473] UAB?

A. It goes down to twenty-two black faculty. Ten of the black faculty are in the nursing school. Expected falls to twenty-six point seven. Have a shortfall of roughly four—roughly five. That represents zero point nine two standard deviations.

Q. And the figures at UAH?

A. UAH, there are only two black faculty on UAH campus out of two hundred seven. However, the next

expected is only four point eight. That's the result of a high tech department mix. Perhaps relatively few blacks currently in the engineering profession with doctorates.

Q. What was the standard?

A. Standard deviation of one point two nine.

Q. And at UAH without nursing?

A. Remain two blacks. They have no black nurses. The expected falls to three point five, and the units of standard deviation dropped to zero point eight one.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Dec. 17, 1985]

MOTION TO AMEND INTERLOCUTORY ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) TO ALLOW AN IMMEDIATE APPEAL AND MOTION FOR A STAY

On December 7, 1985, this Court filed, and on December 9, 1985, this Court entered, in the above action an order (accompanied by a memorandum of opinion) from which the Board of Trustees of The University of Alabama, a defendant in this action, seeks permission to take an immediate appeal under the provisions of § 1292(b), Title 28, *United States Code.* The above-described order does not contain the statement that, under such code section, must be included before an appeal from a non-injunctive interlocutory order may be taken. Therefore, pursuant to Rule 5(a) of the Federal Rules of Appellate Procedure, the defendant Board of Trustees of The University of Alabama respectfully moves the Court to amend such order to include the following statement as a final paragraph thereof:

"In the opinion of the Court this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In support of this motion, the defendant Board of Trustees of The University of Alabama shows the following:

1. The order of the Court dated December 7, 1985, involves controlling questions of law. In the order the Court has found liability of this defendant based on claimed violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution, and has required that a plan to remedy these violations be presented utilizing the United States Office of Education's "Revised Criteria" which have not heretofore been judicially approved or properly adopted as rules or regulations under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* In so ordering, the Court has used legal standards different from those previously applied in higher education desegregation cases of the Eleventh and Fifth Circuits and apparently in the United States Supreme Court. If such standards were applied in this case instead of the legal criteria enunciated by this Court in its Memorandum of Opinion and Order there should be a finding of no liability of this defendant. Assuming, arguendo, liability were found under governing principles previously applied in the higher education cases decided in, or applicable to, the Eleventh Circuit, such holding would require a significantly less expensive and more educationally sound remedy than that mandated by the "Revised Criteria".

2. A substantial ground for difference of opinion as to such order exists inasmuch as:

A. This Court has clearly refused, in the instant order and opinion (pp. 93-97), for reasons stated therein, to

apply, in judging whether this defendant is liable under Title VI and the Fourteenth Amendment, the holding in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968) *a'ffd*, 393 U.S. 400, 89 S.Ct. 681 (1969). In this opinion written by Judge Frank Johnson, the three judge panel concluded that as long as an institution of higher education has nondiscriminatory admissions and hiring policies, and "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90. The court, noting the necessity for different legal standards to be applied between elementary-secondary education and higher education, reasoned that as far as college admissions are concerned, unlike elementary and secondary education, higher education is neither free nor compulsory, and freedom to choose where one will attend college performs the important function of fitting the right school to the right student. In dissenting from the affirmance of this opinion by the United States Supreme Court, Justice Douglas recognized the import of this decision by saying: "The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on the one hand and colleges and universities on the other." *Alabama State Teachers Association v. Alabama Public School and College Authority*, 393 U.S. 400, 401 (1969). Likewise, the Fifth Circuit, in an opinion binding in the Eleventh Circuit, stated: "Well established principles of public school desegregation have not been applied generally to institutions of higher learning in the same manner in which they have been applied to public schools below the college level." *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971).

B. This Court, by requiring the utilization of the Office of Education's "Revised Criteria" in formulating a plan, is permitting the development of an expensive and educationally unsound remedy in this case, similar to that Judge Edenfield of the Southern District of Georgia found inappropriate under legal standards in this Circuit in *Artis v. Board of Regents of the University System of Georgia*, Civil Action No. CV-479-251 (S.D. Ga. Feb. 2, 1981), and which the Fifth Circuit has recently refused to hold to be constitutionally required. See *Ayers v. United States*, 769 F.2d 311 (5th Cir. 1985).

C. This Court has found liability of the Board of Trustees of The University of Alabama, a public corporation and constitutional instrumentality of the State of Alabama, on the liability claims of the United States under Title VI and the Fourteenth Amendment, without any finding of program specific or any other violations by this defendant as required by Title VI and *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912 (1982), *Grove City College v. Bell*, —— U.S. ——, 104 S.Ct. 1211 (1984) and *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). Additionally, this Court, contrary to prevailing precedent, has apparently held that the Attorney General of the United States, in the absence of any statutory authority, has standing to bring its Fourteenth Amendment claims against this state entity. See *United States v. Philadelphia*, 644 F.2d 187 (3rd Cir. 1980), *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). Further, this Court has held that A & M and ASU as state entities have standing and the right to sue the State of Alabama and other State of Alabama entities, such as this defendant, in this action. Additionally, this Court has apparently held that the doctrine of sovereign immunity is not a defense to the actions of ASU and A & M herein.

3. An immediate appeal from such order will materially advance the ultimate termination of the litigation because probably no remedy hearing would be necessary if the appellate courts were to adhere to a non-discrimination-good faith legal standard in this area and such standard were used in judging the conduct of the defendants. However, in the event the appellate courts were to affirm the legal standard enunciated by this Court, or were to announce a new standard, the remedy phase of the action could be tried and decided with certainty. Thus, under any state of facts, an immediate appeal would be beneficial to the ultimate termination of the litigation.

4. This order may be appealable as of right under 28 U.S.C. § 1292(a)(1) because this Court has required the submission of a plan utilizing the "Revised Criteria". Cf. *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (5th Cir. 1964) with *Hoots v. Commonwealth*, 587 F.2d 1340 (3rd Cir. 1978). However, this point is not clear, and it would certainly be desirable to have an order from this Court permitting an immediate appeal. See generally *Taylor v. Board of Education*, 288 F.2d 600 (2nd Cir. 1961), cert. denied, 368 U.S. 940 (1961).

5. The defendant Board of Trustees of The University of Alabama further moves the Court for an order staying further proceedings in this Court pending an appeal by the defendant Board of Trustees of The University of Alabama from the above described order, as amended.

Done this 17th day of December, 1985.

Respectfully submitted,

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES H. SELF, JR.
JOHN CATES

By: /s/ Robert L. Potts
ROBERT L. POTTS
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/s/ C. Glenn Powell
C. GLENN POWELL
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO AMEND INTERLOCUTORY ORDER TO INCLUDE STATEMENT PRESCRIBED BY 28 U.S.C. § 1292(b) TO ALLOW AN IMMEDIATE APPEAL AND MOTION FOR A STAY has been served by me on all parties in this action by depositing a copy of the same in the United States mail, postage prepaid, addressed to the following counsel of record all on this the 17th day of December, 1985.

Mr. Ronald W. Wise
Mr. Charles Coody
Mr. John C. Falkenberry
Mr. Thomas Thagard
Mr. Walter Merrill
Mr. Frederick Ingram
Mr. Frank Ellis, Jr.
Mr. T. Michael Putnam
Mr. James U. Blacksher
Mr. Frank W. Donaldson
Mr. Nathaniel Douglas
Mr. Levern M. Younger
Ms. Jeanne K. Pettenati
Ms. Judith F. Ledbetter
Mr. Ira Dement
Mr. Joe R. Whatley, Jr.
Mr. Solomon Seay, Jr.
Mr. Edward Allen
Mr. William F. Murray, Jr.
Mr. Richard F. Calhoun
Mr. Carl E. Johnson
Ms. Maxey Roberts
Mr. Donald V. Watkins
Ms. Caryl Privett
Mr. Franz R. Marshall
Mr. Jay P. Heubert
Mr. Mylan R. Engel

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By: /s/ Robert L. Potts
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/s/ C. Glenn Powell
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants.

[Filed Feb. 5, 1986]

NOTICE OF APPEAL

Notice is hereby given that The Board of Trustees of The University of Alabama, a public corporation, and the individual members thereof, defendants in the above action, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a) hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order and Memorandum of Opinion filed herein on December 7, 1985, and entered herein on December 9, 1985, as amended on December 9, 1985, and January 17, 1986.

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES SELF
JOHN O. CATES

By: /s/ C. Glenn Powell
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Auburn University and its Board of Trustees (hereinafter referred to as "Auburn University" or "Auburn"), defendants herein, hereby appeal to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a), from the Order and Memorandum Opinion entered in this action on the ninth day of December, 1985.

Bases for Appeal of the Court's Memorandum of Opinion and Order

Auburn's appeal is brought pursuant to 28 U.S.C. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from final judgments of United States District Court and, alternatively, pursuant to 28 U.S.C. § 1292(a)(1), which provides that Courts of Appeals shall have jurisdiction of appeals from interlocutory orders granting injunctive relief. These alternative bases for appeal will be developed herein.

Statement of Facts

This action was commenced by the United States on June 11, 1983 against the State of Alabama, its Governor, its State Board of Education, ten state colleges and universities, the Alabama Commission on Higher Education and the Alabama Public School and College Authority. The action was brought pursuant to Title VI of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.

The Complaint alleges that, based upon an investigation of higher education in Alabama, the United States Department of Education had made findings that the State of Alabama was in violation of Title VI by failing to eliminate the vestiges of a former racially dual system of higher education. The Complaint also alleges that upon failure of the State of Alabama to present a desegregation plan satisfactory to the Department of Education, such Department referred the matter to the Department of Justice for enforcement.

The Complaint states that prior to 1953, the State of Alabama established and maintained a racially dual systerm of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. Among the defendant institutions, the Complaint alleges Alabama A&M University and Alabama State University to be traditionally black institutions and all others, including the defendant Auburn University, to be traditionally white institutions.

On July 25, 1983 a motion was filed by Alabama A&M University to be realigned as party plaintiff in order to assert Title VI, 42 U.S.C. § 1981 and 1983 and Fourteenth Amendment claims against Auburn University,

the University of Alabama and the State of Alabama. A similar motion was filed by Alabama State University on August 3, 1983. The Court granted these motions and gave Alabama A&M and Alabama State leave to assert claims, as plaintiffs, against the defendants.

On September 6, 1983, Auburn University moved to disqualify the trial judge pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455. As grounds therefor, Auburn asserted, *inter alia*, that the trial judge was biased and prejudiced against it and in favor of the realigned plaintiffs Alabama A&M University and Alabama State University and that his relationship with Mr. Donald Stewart, counsel for Alabama A&M, who as a United States Senator had sponsored his nomination as a United States District Judge three years earlier, was such that a reasonable person might doubt his impartiality. This issue was particularly important to Auburn because Alabama A&M was asserting a right to administrative control, in the northern half of Alabama, of the Alabama Cooperative Extension Service and the Alabama Agricultural Experiment Station, both of which have been administered by Auburn University for seventy-five years. Auburn also alleged that the trial judge had extrajudicial access to facts relevant to the present action because he was one of the attorneys for plaintiffs in *Lee v. Macon County Board of Education*, the previous statewide public school and college desegregation suit in Alabama.

The trial court overruled the motion to disqualify. On October 12, 1983, Auburn University filed a petition for writ of mandamus with the Eleventh Circuit Court of Appeals setting forth that its motion for disqualification under both 28 U.S.C. § 144 and 28 U.S.C. § 455 should have been granted. The Court of Appeals held Auburn's § 144 affidavit to be legally sufficient but remanded the matter with directions that another judge be assigned to hear the recusal proceedings. On December 19, 1983, Judge Hobart H. Grooms of the United States District

Court for the Northern District of Alabama entered an opinion and order finding that a reasonable person would harbor a doubt as to the trial judge's impartiality and granting Auburn's motion for recusal. On January 19, 1984, Judge Grooms vacated his order and recused himself, stating that the recusal proceedings should be heard by a judge who was not a member of the United States District Court for the Northern District of Alabama. On February 13, 1984, the matter was heard again before the Honorable Judge David W. Dyer who, on March 16, 1984, denied Auburn's motion for recusal of the trial judge.[1]

On September 15, 1983, a class of individuals described as "students, alumni, faculty and administrators of Alabama State University," represented by John F. Knight,

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[1] Subsequently, in June of 1984, the United States District Court for the Northern District of Georgia compelled the United States to produce documents requested by Auburn during depositions of United States Department of Education personnel in Atlanta. These documents included a newspaper clipping attached hereto as Exhibit A, which relates the trial judge's actions while a member of the Alabama State Senate in leading a filibuster, on racial grounds, in opposition to the appointment of a white person as a member of the board of trustees of predominantly black Alabama State University. The existence of this document was unknown to this defendant at the time the recusal motions were being considered, and it is obviously relevant on that issue. But it is also relevant on the merits. Dr. Steven Wright, a United States' expert witness, gave opinion evidence that racial integration of institutional governing boards is important to the elimination of racial identifiability of student bodies. The article was made an exhibit to Dr. Wright's deposition, but the trial court refused to permit cross-examination of the witness on this issue and refused to allow the deposition and its exhibits to be introduced into evidence at trial. In the trial court's Memorandum Opinion, the racial identifiability of institutional governing boards, including Alabama State's, was considered "probative" to the "question of whether the dual system has been disestablished." Opinion at 62, 75. The fact that the "Governor has generally appointed blacks to the board" was characterized as a vestige of segregation. Opinion at 75.

Jr., moved the Court to intervene in the present action. The "Knight Intervenors" sought in their complaint in intervention to eliminate the "vestiges of prior *de jure* segregation" alleged to be present in the three Montgomery, Alabama public institutions of higher education, Auburn University at Montgomery, Alabama State University and Troy State University at Montgomery. The Knight class was certified and intervention was allowed by the District Court on January 3, 1985.

After one and one half years of intensive discovery, in which a number of disputes arose, including one area of controversy that resulted in conflicting decisions by the trial court and Judge Marvin Shoob of the United States District Court for the Northern District of Georgia, the case was tried during the entire month of July and the first week of August, 1985. The trial involved 9000 pages of transcipt, and over 1,700 exhibits were introduced.

On December 9, 1985 the Memorandum of Opinion and Order, which concluded "that the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; that in other respects, the 'root and branches' of the dual system have not been eliminated," was entered. Memorandum of Opinion at 2. The court ordered the "Defendants State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority [to] submit to the Court not later than February 14, 1986, a plan to elimiante all vestiges of the dual system of higher education in Alabama." The Court's Order specified that within fifteen days the "affected institutions" will submit their "comments or objections" to the plan in twenty-five pages or less. *See* Order at 2.

In its opinion, the trial court declared no longer viable a United States Supreme Court decision from this circuit, *Alabama State Teachers Association v. Alabama Public*

School and College Authority, et al., 289 F. Supp. 784 (M.D. Ala 1968), *aff'd.* 393 U.S. 400 (1969), which has not been overruled and which establishes duties and principles of law in relation to desegregation in higher education that are irreconcilable with the District Court's Order.

The Court's Memorandum of Opinion, with a high degree of specificity, makes the following findings, *inter alia*,

1) that "[t]he continued recognition of a special 'constitutional status' for the University of Alabama and Auburn due to their inclusion in the 1901 constitution, when Alabama State and Alabama A&M were omitted from the said constitution for racial reasons, is a vestige of the dual school system." (Opinion at 91),

2) that the assignment of the Alabama Agricultural Experiment Station and the Alabama Cooperative Extension Service to Auburn University is unconstitutional, (Opinion at 56, 61-62),

3) that Auburn University's admissions requirements impermissibly exclude blacks from attendance at Auburn, (Opinion at 71-72),

4) that Auburn does not actively recruit blacks for faculty positions (Opinion at 71),

5) that "[t]here is substantial needless duplication of the education and business programs offered by AUM [Auburn University at Montgomery] and ASU [Alabama State University]," and that "[t]he presence of duplicated programs at AUM—a much newer and more attractive facility than ASU—has a negative impact on which enrollment at ASU," (Opinion at 75),

6) that the "undergraduate and graduate teacher education and certification programs offered at

UAH [University of Alabama in Huntsville] unnecessarily duplicate similar and older programs offered at [Alabama] A&M" and thereby reduce its white enrollment, (Opinion at 66-67),

7) that computer science courses at UAH unnecessarily duplicate similar courses at A&M thereby reducing white enrollment at A&M, (Opinion at 67),

8) that the races of the chief executive officers of the Alabama public institutions of higher education is a vestige of the prior *de jure* segregated system of higher education, (Opinion at 89),

9) that "Alabama's choice of resources allocation for facilities for the period 1965 to 1983 significantly impaired the ability of Alabama State and [Alabama] A&M to attract white students," (Opinion at 89), and

10) that the state's financial resource allocation for things other than facilities has caused Alabama A&M's and Alabama State's student bodies to remain segregated, (Opinion at 90-91).

In the Order appealed from, the District Court ordered and directed that each of these "vestiges" be eliminated, directing that a plan to eliminate them be submitted by four of the defendants by February 14, 1986 and permitting Auburn and others to comment within fourteen days in twenty-five pages or less.

The grounds for Auburn's appeal will be embraced in two general headings, *viz*: (1) errors in the Court's legal conclusions and evidentiary findings on the merits and (2) error in denying Auburn's recusal motion under the facts as set out in Auburn's 28 U.S.C. § 144 affidavit and as presented at the hearings on recusal.[2]

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[2] As held by the Eleventh Circuit in considering Auburn's petition for mandamus, "The affidavit sets forth sufficient factual allegations

Auburn will establish in its brief to be filed later in this appeal that the District Court's Memorandum of Opinion and Order apply incorrect legal principles and make factual findings that are clearly erroneous. The evidence presented during the trial of this action established that race played no part in the Alabama constitutional provisions vesting management and control of Auburn University and the University of Alabama in their boards of trustees, that AUM has been a race neutral institution since its creation, that allocation of state financial resources has not disfavored ASU or A&M, that Auburn's status as administrator of Alabama's statewide Agricultural Experiment Station and statewide Cooperative Extension Service[3] has nothing to do with race, that the ACT as used by Auburn is a valid test and that Auburn actively recruits black faculty. Auburn will also establish that based upon the evidence available prior to the March, 1984 order on recusal, it was abundantly clear that the trial judge has an extrajudicial bias against Auburn as well as against others for whose actions the United States contends Auburn is to be held accountable.[4]

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to require that the 'judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.' 28 U.S.C. § 144." The record will demonstrate that in denying Auburn's recusal motion, Judge Dyer did not find that the facts presented in the § 144 affidavit were untrue.

[3] The administrative structure of the Alabama Cooperative Extension Service was desegregated and reorganized pursuant to court orders in *Strain v. Philpott*, CV840-E, United States District Court for the Middle District of Alabama, which currently exercises continuing jurisdiction over these matters.

[4] The United States has never cited or relied on "institutional" violations of Title VI; indeed, the Department of Education investigation found none. Rather, the United States has focused throughout on a "statewide" approach that disregards institutional innocence, contrary to *Grove City College v. Bell*, —— U.S. ——, 104 S. Ct. 1211 (1983), and for that reason bias of the trial judge for or against any institution agency or official of higher education in Alabama has the potential to impact upon Auburn University under the United States' approach to this case.

The Court's Order and Memorandum of Opinion Constitutes a "Final Judgment" Appealable Pursuant to 28 U.S.C. § 1291

28 U.S.C. § 1291 provides that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where a direct review may be had in the Supreme Court.

What constitutes a "final decision" has been the subject of extensive discussion in the appellate courts of the United States, especially where the district court appears to have decided less than all of the issues in the case or where, as here, the court orders one or more of the parties to devise a plan to implement its decision.

The United States Supreme Court addressed just such an issue in *Brown Shoe Company, Inc. v. United States*, 370 U.S. 294 (1962). *Brown Shoe* was an appeal brought pursuant to the Expediting Act, 15 U.S.C. § 29,[5] from a decision of a district court in an antitrust action.

The district court's order in *Brown Shoe* held that the merger of Brown Shoe Company with Kinney Shoe Company substantially lessened competition in the family shoe market and constituted a violation of the Clayton Act, 15 U.S.C. § 18. *See United States v. Brown Shoe Company*, 179 F.Supp. 721 (E.D. Mo. 1959). The district court ordered the defendant Brown Shoe Company to "relinquish and dispose of the acquired stock of defendant Kinney" and enjoined "Brown and Kinney, their agents, servants, officers and employees from acquiring

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[5] The Expediting Act provides that the United States Supreme Court has jurisdiction of appeals from final orders of United States district courts in antitrust cases in which the United States is a party.

any interest in the stock or assets of the other defendant." *See* 179 F. Supp. at 741.

The district court, recognizing the complexity of the situation and the difficulty of implementation of the divestiture, held that it "should hear any evidence which the defendants might wish to offer touching the effects of the disposition of the stock and the suitable manner in handling same. The government should be given an opportunity to express opposition or suggestion therein." 179 F.Supp. at 742. The court held that no "final" judgment would be entered until after such hearing and the approval by the court of an acceptable plan for divestiture. 179 F.Supp. at 742.

Brown Shoe Company appealed the order of the district court immediately, without waiting for a decision from the district court adopting a plan for the divestiture. The United States Supreme Court raised the issue of the finality of the district court's decision on its own, stating that, "[i]t was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not 'final' as contemplated by the Expediting Act." 370 U.S. at 305. The Court, after noting that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action,'" 370 U.S. at 306; held that the decree of the district court "had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time." 370 U.S. at 308.

The Supreme Court held that the requirement of the submission of a plan designed to implement the order for divestiture did not deprive it of jurisdiction since, in the event the District Court's order was affirmed, "the sole

remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, . . . are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for review now." 370 U.S. at 308.

The Court's decision that the order was final was buttressed by the fact that "[a]ppellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that under the facts of the case, as alleged and proved by the Government, *no* order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an 'all or nothing basis' " 370 U.S. at 308-309.

An additional reason cited by the Court for deciding the issue in favor of finality was the magnitude of the divestiture ordered by the district court. The Court held that "[s]uch an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws." 370 U.S. at 309.

Thus, the Court ruled that where the order of a district court makes clear the result sought, the fact that the method for the accomplishment of the result is yet to be established does not render the court's decision any less "final." Rather, when the court has decided the issue of liability and has ordered the relief sought in the complaint, the fact that further rulings of the district court may be necessary to implement or administer its decree does not deprive the appellate court of jurisdiction. *See* 370 U.S. at 308.

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the United States Supreme Court defined and elaborated on the principles applied in *Brown Shoe* in holding that the requirement of finality is to be given a "practical rather than a technical construction." The Court held that questions in the so-called "twilight zone of finality" should be decided by balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," as well as by considering the importance of the question presented to "the further conduct of the case." 379 U.S. at 152-153. The court in *Gillespie* conclusively established that in order to be "final," a decision need not be "the last order possible to be made in a case." 379 U.S. at 152.[6]

In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974) *cert. denied*, 419 U.S. 1108 (1974), the Sixth Circuit Court of Appeals applied the principles set forth in *Gillespie* to an order of a district court that individual plaintiffs had made out a case under the Fair Housing Act that municipal defendants had violated the plaintiffs' constitutional rights by refusing to execute cooperation agreements with a housing authority to construct low-cost housing. The district court "treated the case before him like a school desegregation case and ordered CMHA [the housing authority] 'to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs.' " 500 F.2d at 1090. The court held

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[6] *See Thoms v. Heffernan*, 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 908 (1974), in which a decision of a United States District Court declared a flag misuse statute unconstitutional but neither granted nor denied injunctive relief. The Court of Appeals held that "[t]he fact that further proceedings leading to an injunction are possible below does not render the judgment of the district court in this case any less final." 473 F.2d at 481.

that the municipal defendants had the burden of showing "a compelling necessity" for not complying with the plan submitted. 500 F.2d at 1090-91, n.3.

The municipal defendants appealed prior to the submission of the court-ordered plan, and the Court of Appeals addressed the issue of finality as follows:

> *Gillespie* indicated that an appellate court should give consideration to four factors in determining whether an order of a lower court is 'final' within the meaning of 28 U.S.C. § 1291:
>
> 1. Whether an order is final depends on whether it has been given a 'practical rather than technical construction,' . . .
> 2. Whether an order is final depends on whether the issue appealed is fundamental to the further conduct of the litigation. . . .
> 3. Whether an order is final depends on whether the parties will be put to additional expenses if the appealed issue is not resolved by the appellate court.
> 4. In cases where the issue of finality is close or marginal, the court of appeals should find in favor of finality.

500 F.2d at 1090-91, n.3.

The *Mahaley* court held that the four elements of finality, as they applied to the case before it, were satisfied in that: 1) the district court had, in effect, rejected any reason the municipal defendant might advance for not executing the cooperation agreements in question, 2) the question of whether the municipalities had violated 42 U.S.C. § 1983 by their refusal to sign cooperation agreements was "fundamental to the further conduct of this case," 3) the inconvenience and cost of a second trial would be great, especially since "the trial record contains

all the evidence necessary for this Court to make a full and complete disposition of all of the issues in the case," and 4) the issue of finality was not even close. *See* 500 F.2d at 1091, n.3.

In *Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976), *rev'd* 430 U.S. 322 (1977) (expressly affirming on the issue of the finality of the district court's order), the Fifth Circuit Court of Appeals reviewed the decision of the United States District Court for the Eastern District of Texas that the constitutional rights of minors incarcerated in Texas juvenile correctional facilities had been violated and ordering all parties to meet and agree upon a plan to eliminate the unconstitutional conditions found by the district court in accordance with certain "minimum standards" enumerated by the court in *Morales v. Turman*, 333 F.Supp. 53 (E.D. Tex. 1974). The Fifth Circuit held that the district court's order was final under 28 U.S.C. § 1291, stating:

> Appellees concede the finality and appealability of the lower court's determination that the constitutional rights of minors incarcerated by the TYC have been violated. They maintain, however, that the detailed 'minimum standards' necessary for protection of those rights—particularly the right to treatment—are not final because the judge withheld issuance of permanent injunctive relief pending submission of a comprehensive plan to be drawn up by the parties. The difficulty with this contention is that while some flexibility was left to the parties in determining precisely how compliance with the minimum standards would be structured, the District Court made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion. *See* 383 F. Supp. at 126. In circumstances such as these, the requirement of finality must be given a practical construction. *See Gillespie v. United States Steel Corp.*, 379

> U.S. 148, 152-53, 85 S.Ct. 308, 311, 13 L.Ed. 2nd 199 (1964). The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable.[7]

535 F.2d at 867, n.6.

The Fifth Circuit rejected the contention by the appellee that the minimum standards established by the district court were "mere guidelines subject to further negotiation by the parties." Rather, the court held that the district court's opinion constituted:

> "a final ajudication determining the minimal content that must be given to the 'right to treatment' as it applies to virtually every aspect of TYC operations."

535 F.2d at 867, n.6.[8]

As in *Brown Shoe*, the district court order has made specific findings of illegal conditions and practices, and has ordered the state to submit a plan to eliminate those conditions and practices. "The sole remaining task for the District Court will be its acceptance of a plan [to eliminate the vestiges][9] and the supervision of the plan

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[7] The United States Supreme Court, though reversing on the merits, expressly affirmed the Fifth Circuit's holding as to finality.

[8] The *Morales* opinion is consistent with the Fifth Circuit's decision in *Board of Public Instruction of Duval County v. Braxton*, 326 F.2d 616 (Fifth Cir. 1964). In *Braxton*, the Fifth Circuit held that the order of a district court in a school desegregation case that a plan be submitted that would eliminate certain specified unconstitutional conditions in the school system was appealable because it foreclosed any discretion on the part of the school board ordered to submit the desegregation plan by specifically enumerating the conditions to be eliminated. *See* 326 F.2d at 619.

[9] It would not be inaccurate to say that the district court has ordered the defendants to "divest" themselves of the "vestiges" it

so accepted." *See Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962). *Brown Shoe* illustrates that the court's decision is not merely a decision on liability, leaving remedy to be decided at a later time.

It is clear that, as in *Morales*, the court in the instant case, while leaving some "flexibility" to the State in determining precisely how the elimination of the vestiges would be accomplished, "made it perfectly clear that any plan submitted must be consistent with the minimum requirements laid out in its opinion." *See Morales*, 535 F.2d at 867, n.6. "The fact that the lower court has instructed the parties to arrange the details of implementing its decision does not imply that the underlying determination of the minimum standards supposedly required by the right to treatment are not appealable." *See Morales*, 535 F.2d at 867, n.6. As the Fifth Circuit stated in *Morales*, the vestiges found by the Court "constitute a final adjudication determining" the conditions in Alabama's public institutions of higher education which must be either eliminated or changed in strict accordance with the court's Opinion in order for any plan submitted by the State to comply with the order.

The court's exclusion of Auburn and the other state institutions of higher education from the planning process is another ground for deciding the question of practical finality in favor of Auburn. From its standpoint, Auburn has been found guilty and has no say as to remedy in this case other than to object to and comment upon the plan submitted by the State defendants in twenty-five pages or less. The exclusion of Auburn from the planning process effectively ends the trial as

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found. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962). As in *Brown Shoe*, the United States received *everything* it asked for, an order requiring the submission of a plan designed to eliminate the alleged vestiges of the prior racially dual school system.

far as Auburn is concerned and makes the court's decision final.

The other three elements of finality enumerated by the *Mahaley* court are all in favor of finality in this case. First, there is no question that the correctness of the court's decisions with regard to the vestiges cited by the court in its Memorandum of Opinion, including the constitutional status of Auburn, the administration of the Alabama Agricultural Experiment Station and Alabama Cooperative Extension Service [10], Auburn's admissions requirements and the duplication of programs is fundamental to the further conduct of this case. Reversal of the court on these issues would have a profound impact on its finding of liability in general and completely redefine any remedy ordered.

Next, the inconvenience and cost of a second trial in this case, should the court's decision be reversed, as well as the expense of discovery and a hearing in the remedial phase, justify appeal at this time, especially since, as in *Mahaley*, "the trial record contains all of the evidence necessary for [the Appellate Court] to make a full and complete disposition of all of the issues in this case." 500 F.2d at 1091. This factor is particularly important in this case since, as in *Brown Shoe*, administration of the remedy will likely be a lengthy and complicated task.

A reversal by the Court of Appeals on any of the major issues before it on this appeal, such as whether the District Court had jurisdiction of claims relating to programs administered by the United States Department

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[10] Title VI enforcement authority for these programs rests with the U.S. Department of Agriculture under 7 CFR Part 15, and the appendix thereto. USDA has found them to be *in compliance* with Title VI, and USDA had no role in bringing this action. These programs were not, and could not properly have been, included in the Title VI investigation by the Department of Education, which caused this action to be filed.

of Agriculture,[11] whether program transfers are necessary or appropriate between Auburn University in Montgomery[12] and Alabama State University, whether Alabama A&M and Alabama State have been discriminated against in terms of financing and capital improvements or whether Auburn's use of high school grades in combination with the American College Test as an admissions criterion is valid, would, if decided in Auburn's favor, narrow the scope of relief in the case and thereby reduce the time and expense associated with the implementation and administration of any plan approved by the court. Similarly, and perhaps even more importantly, reversal on the issue of recusal at this point in the proceedings would be more economical than reversal after the approval and implementation of a plan.

Finally, any court-approved plan that is designed to alter the racial composition of students and faculty at the defendant universities would be more effective if the legal conclusions and factual findings underlying the implementation of the plan were reviewed by this Court prior to the plan's implementation. The success or failure of any plan approved by the court will depend not only upon the efforts of the parties but upon the public's perception of its permanence. A plan perceived as temporary pending review by the Court of Appeals will not likely affect attendance patterns of students nor application flow for faculty positions. On the other hand, if the order requiring submission of a plan is not reviewed now, the administration of the plan will disrupt, perhaps needlessly, the education of students and affect employ-

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[11] See note 10 *supra*.

[12] AUM was created after legal segregation ended in Alabama, and it is undisputed that it has never been segregated or discriminated against anyone on the basis of race. Its creation was approved in *Alabama State Teachers Association v. Alabama Public School and College Authority, et al.*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969).

ment of faculty, including tenured faculty, at institutions whose programs are altered consistent with the court's opinion. "The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling" the implementation of the plan "would only make still more difficult the task of assuring expeditious enforcement" of the civil rights laws. *Cf. Brown Shoe Company v. United States*, 370 U.S. 294, 309 (1962).

Finally, since the Court of Appeals should find in favor of finality "where the issue of finality is close or marginal," the similarity of the case at bar to the *Brown Shoe, Mahaley,* and *Morales* cases should compel a determination that the court's Memorandum of Opinion and Order are final and appealable.

The Court's Order is a Mandatory Injunction Appealable Pursuant to 28 U.S.C. § 1292(a)(1)

An order requiring the submission of a plan to implement a decision of a United States district court may be appealable as a final decision, under 28 U.S.C. § 1291, or as an interlocutory mandatory injunction appealable under 28 U.S.C. § 1292(a)(1). *See Morales v. Turman*, 535 F.2d 864, 867, N.6 (5th Cir. 1976), *rev'd.* 430 U.S. 322 (1977) (expressly affirming on the issue of finality). In the present case, even if the order of the district court is not a "final decision", it is a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1).

In *Board of Public Instruction v. Braxton*, 326 F.2d 616 (5th Cir. 1964), the Fifth Circuit Court of Appeals held that the order of the United States District Court for the Middle District of Florida requiring a county school board to submit a plan designed to eliminate segregation in the county's schools was a mandatory injunction appealable pursuant to 28 U.S.C. § 1292(a)(1). The court distinguished the case before it from *Taylor v. Board of Education*, 288 F.2d 600 (2nd Cir. 1961), which held that a similar order was not appealable, on the

grounds that the Florida court's order denominated certain practices and conditions which should be addressed by the plan. To the extent the Second Circuit held otherwise in *Taylor*, the Fifth Circuit expressly differed with that court's judgment. *See Braxton*, at 619. In the instant case, as in *Braxton*, the district court has ordered the State to submit a plan eliminating vestiges specifically enumerated by the court in its order. Thus, the court in this case, as in *Braxton*, "positively and affirmatively directed that a plan be submitted that *would provide for carrying out*" the elimination of the vestiges noted (emphasis supplied by court). *See* 326 F.2d at 619.

The fact that only the Governor, the Alabama Commission on Higher Education and the Alabama Public School and College Authority were ordred to prepare and submit the plan does not render the order unappealable as to Auburn. A litigant who was a party below and who is aggrieved by the judgment or order may appeal the judgment or order. *See e.g. Burleson v. Coastal Recreation, Inc.*, 572 F.2d 509 (5th Cir. 1978). In the present case, Auburn has clearly been "aggrieved" by the court's Memorandum of Opinion and Order. It has been held guilty of racial discrimination and of being a part of a segregated system of higher education of the State. The court has ordered that its state constitutional status violates the United States Constitution and that its status as the premier land-grant institution in the State of Alabama is due to impermissible racial motives. Its use of the ACT test as an admissions criterion has been held invalid. Critical programs at AUM, which without dispute has never discriminated based on race, have been characterized as vestiges of an era in which it did not exist.[13] The Court has ordered the State to submit a plan which would eliminate all of these conditions that Auburn has defended as race neutral and sought to preserve. Thus, Auburn is clearly "aggrieved" by the

[13] See note 12 *supra*.

Court's opinion, even if it has not been ordered, or allowed, to participate in the preparation and submission of the plan.

Even non-parties have been allowed to appeal judgment of United States District Courts if the court's decree significantly affects their interests; *see e.g., United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *Securities and Exchange Commission v. Lincoln Thrift Association*, 577 F.2d 600 (9th Cir. 1978); *West v. Radio-Keith Orpheum Corp.*, 70 F.2d 621 (2d Cir. 1934); or requires action on their part to effectuate the remedy. *See Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). In both *Securities and Exchange Commission v. Lincoln Thrift Association*, and *West v. Radio-Keith Orpheum Corp.*, non-party creditors who asserted rights in receivership proceedings were allowed to appeal orders affecting their legitimate interests. In *Chagra* as well as in many other cases from the Fifth Circuit, non-parties were allowed to appeal orders of district courts enjoining the publication of court files or the closure of hearings from the public. *See also Belo Broadcasting Corp. v. Gurney*, 654 F.2d 423, 425-426 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

In *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605 (9th Cir. 1980), the district court dismissed the Board of Bar Examiners of the State of Nevada from an action to enjoin the state from denying a graduate of an unaccredited law school admission to the state bar. Nevertheless, the court issued a preliminary injunction enjoining the "defendants" from preventing Brown from sitting for the bar examination. 623 F.2d at 607. Because the Supreme Court of Nevada had delegated to the Board of Bar Examiners the power to examine applicants for admission to the Bar, the Ninth Circuit Court of Appeals held that the Board was a proper party to appeal the district court's ruling, regard-

less of the lower court's holding that the Board was due to be dismissed from the case. 623 F.2d at 607. Auburn will be required to comply with whatever plan is approved by the Court regardless of its participation in plan formulation. Therefore, Auburn would be a proper party to appeal even were it not a party to the litigation.

Conclusion

Auburn has asserted two bases for appeal of the court's Memorandum of Opinion and Order. First, the Memorandum of Opinion and Order constitute a "final decision" appealable pursuant to 28 U.S.C. § 1291 because its practical effect is to decide all of the issues, including remedial issues, in the present action. Alternatively, if interlocutory, the order is a mandatory injunction appealable pursuant to 28 U.S.C. 1292(a)(1) because it specifies the elements to be addressed by the plan submitted by the state defendants. Based upon the foregoing legal authorities, the memorandum of opinion and order are appealable by Auburn University without further action by the United States District Court for the North District of Alabama. In this appeal, the grounds will be error in legal principles applied and clear error in findings of fact, both on the merits and regarding recusal.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon the following attorneys by first-class United States mail, postage prepaid, on this 5th day of February, 1986:

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Mr. T. Michael Putnam
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Of Counsel

EXHIBIT A

[Alabama Journal 6/6/77]

Solon Seeks Black Majority

CLEMON OPPOSING ASU BOARD NOMINATION

By LENORE REESE

The chairman of Alabama State University's board of trustees may never be confirmed by the State Senate because of what one black senator has termed "racially discriminatory" actions by Gov. George Wallace.

Tom Radney, a white Alexander City attorney and former state senator has been serving as board chairman since March 1975, although he had never been approved by the Senate.

And he won't be, according to Sen. U. W. Clemon of Birmingham, who said today he'll oppose Radney's confirmation because he wants a black majority on the board.

Currently the board for the predominantly black school has a 5-4 white majority.

Clemon termed Wallace's appointment of five whites and four blacks "evidence of his undying dedication to the belief that black people are incapable of governing themselves."

Radney was the only ASU trustee not confirmed by the Senate during the last regular legislative session. His name was resubmitted by the governor's office during the current special session but has remained in the Rules Committee of which Clemon is acting chairman.

Clemon said he had "ample support" within the committee to keep the appointment from being brought before the full Senate.

Contacted in Alexander City, Radney said he planned to continue serving as board chairman under his "interim appointment" by the governor despite Clemon's opposition.

Radney said he did not think Clemon's stand was a personal matter because, "I don't even know him."

"I would call his attention to my voting record in the Senate on behalf of minorities," Radney said, adding that he was "color-blind" and didn't believe in "quotas" on boards of trustees or elsewhere.

Radney was re-elected board chairman for another year last month.

Clemon said a similar situation involved confirmation of two trustees at the state's other predominantly black university, Alabama A&M in Huntsville.

He said Wallace's appointment of majority white boards of trustees at the two black schools was another example of his "racially discriminatory" behavior.

Clemon said he had no specific person in mind to replace Radney, only that he or she be a graduate of the university.

Under the bill creating the ASU board, the nine were to be appointed from each of the seven congressional districts and two from the state at large.

Before the board was created, the school was under the control of the State Board of Education.

Should Radney continue to serve without Senate confirmation, Clemon said he plans to take another look at the statute setting up the board to see if such a move would be legal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 86-7090

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
and the individual members of its board,
Defendants-Appellants,

vs.

UNITED STATES OF AMERICA, JOHN F. KNIGHT, JR., *et al.*,
Individually and on behalf of others similarly-situated,
THE BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY and THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY,
Plaintiffs-Appellees.

(On appeal from the United States District Court
for the Northern District of Alabama, Southern Division
Civil Action Number 83-C-1676-S)

MOTION FOR A STAY OF THE DISTRICT COURT MEMORANDUM OF OPINION AND ORDER PENDING APPEAL

Comes now The Board of Trustees of The University of Alabama and the individual members of its Board (hereinafter "University"), appellants herein, and respectfully apply to this Court under Rule 8 of the Federal Rules of Appellate Procedure for a stay of the Memorandum of Opinion and Order entered on December 9, 1985, by the District Court for the Northern District of Alabama in the case of *United States of America, et al. v. State of*

Alabama, et al., Civil Action No. 83-C-1676-S, as amended as hereinafter set out, and for a stay of all further proceedings in said District Court under or pursuant to said Memorandum of Opinion and Order pending the appeal thereof. As a basis for this motion, the University contends and would show unto this Court that it is likely that the University shall prevail on the merits of its appeal; that the success and quality of its academic and public service programs and its recruitment and retention of students and faculties will likely suffer irreparable injury from a denial of this stay; that the plaintiffs and the other parties will not be substantially harmed by granting this stay; and that the public interest will be advanced if the stay is granted, as follows:

I. STATEMENT OF FACTS

The United States of America filed this action on July 11, 1983, against the State of Alabama, its Governor, its State Board of Education, its State Superintendent of Education, the ten senior public institutions of higher education in the State of Alabama, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority. The suit was brought by the Attorney General of the United States pursuant to § 601 and 602 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d and 2000d-1) and the fourteenth amendment to the Constitution of the United States. The complaint stated that pursuant to statutes, customs, and usages of the State of Alabama, a racially dual system of public senior higher education in Alabama was created and that vestiges remained in the racial identifiability of the faculty, staffs, student bodies, and governing boards of the institutions.

On July 25, 1983, a motion was filed by A&M University, and on August 5, 1983, a motion was filed by Alabama State University (the two predominantly black institutions named in the complaint of the USA), both seeking to be realigned as a party plaintiff, or in the

alternative for leave to file cross claims, in order to assert separate claims against certain of the parties, including the United States. The Court subsequently entered an order realigning A&M and ASU as plaintiffs.

On September 15, 1983, the class of plaintiffs in an action, pending in the United States District Court for the Middle District of Alabama (*Knight et al. v. James et al.*, Civil Action No. 81-H-0052-N) brought to merge into Alabama State University the predominantly white institutions operating in the Montgomery area (Auburn University at Montgomery and Troy State University at Montgomery), moved in this action to intervene as plaintiffs, and the petition was granted on April 18, 1984. Subsequently, on January 3, 1985, the Court ordered that the action would proceed as a class action with respect to the claims of the plaintiffs-intervenors and certified subclasses of graduates of Alabama State University; black adult citizens or minor children of the State who are attending, eligible to attend, or will become eligible to attend the public institutions of higher education in the Montgomery area; and black citizens who were, are, or will become eligible to be employed by the public institutions of higher education in the Montgomery area.

After extensive and continuing discovery, the trial began on July 1, 1985, and continued through August 2, 1985. Upon completion of the trial, the Court provided for and received proposed statements of fact and conclusions of law and posttrial briefs from the parties and then issued an order dated December 7, 1985, and entered on December 9, 1985, (attached hereto as Exhibit 1 and hereinafter referred to as the "Order") in conformity with its Memorandum of Opinion also dated December 7, 1985, and entered on December 9, 1985, (hereinafter the "Memorandum of Opinion"). By an order entered on December 10, 1985, corrections were made by the Court to the Memorandum of Opinion by withdrawing and substituting certain pages. The Memorandum of Opinion

with the corrected pages substituted is attached hereto as Exhibit 2. Further, on January 3, 1986, the Court granted a motion filed by Livingston University on December 13, 1985, to amend and correct certain portions of the Memorandum of Opinion relating to Livingston University but not material to the consideration of this Motion for a stay.

On December 17, 1985, the University filed a motion asking the trial court to amend its Order and Memorandum of Opinion to include the statement prescribed by 28 USC § 1292(b) to permit an immediate appeal and a motion for a stay of further proceedings in the trial court pending an appeal by it, a copy of which motion is attached hereto as Exhibit 3. Other defendants, namely, the Alabama State Board of Education and State Superintendent of Education Wayne Teague; Auburn University; Troy State University; and the State of Alabama, its Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority filed similar motions seeking to take an immediate appeal under the provisions of § 1292(b), and, except for Auburn University, seeking a stay of further proceedings. On January 3, 1986, the Court made and entered an Order overruling the "various motions of the defendants, insofar as they request a stay of the Court's Order of December 7, 1985 . . . ." A copy of that order is attached hereto as Exhibit 4, and is hereinafter referred to as the "January 3 Order". The January 3 Order also provided that the parties could file briefs in support of or in opposition to the use of the "United States Office Of Education's Revised Criteria Specifying The Ingredients Of Acceptable Plans To Desegregate State Systems Of Higher Education" (hereinafter the "Revised Criteria"). (The trial court's Order directing the State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Public School and College Authority to submit to the court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of

higher education in Alabama directed that the plan "utilize" the Revised Criteria.) At a hearing on January 17, 1986, the trial court deleted from its Order the requirement that the plan utilize the Revised Criteria. The transcript of that hearing is attached hereto as Exhibit 5. On January 22, 1986, the trial court overruled the motion of the University seeking an interlocutory appeal under 28 USC § 1292(b) and on that same date overruled the similar motions of the other defendants.

On February 5, 1986, the University filed its notice of appeal to this Court pursuant to 28 USC § 1291 and 28 USC § 1292(a). Similar notices of appeal were filed on that same day by Auburn University, Troy State University, and the State Board of Education and the State Superintendent of Education. On February 7, 1986, Auburn University petitioned the trial court for a stay of its Order and, as of February 11, 1986, the trial court had not ruled on that petition.

THE ASU TEACHER EDUCATION PROGRAM APPEAL:

On August 15, 1985, ASU filed and on August 16, 1985, the Knight Intervenors filed separate motions in this action for temporary restraining orders seeking to enjoin the Alabama State Board of Education and the State Superintendent of Education from failing or refusing to approve certain teacher education programs at ASU. Hearings were held on these motions by the trial court on August 16 and 17, 1985. On August 20, 21, and 23, 1985, the trial court entered a series of orders which, in effect, enjoined the State Board of Education to approve certain teacher education programs at ASU. Those orders have been appealed by the State Board of Education and State Superintendent to this Court and the appeal is pending in this Court as Appeal No. 85-7582. The University was granted leave to file and has filed an

amicus curiae brief in that appeal. Many of the same legal issues underlying this case are presented in that appeal.

II. GROUNDS FOR THE MOTION TO STAY

A. *A Motion for Stay filed by the University has been denied by the trial court and any further motion for stay in the District Court would be a useless exercise.*

As set out above and as contained in Exhibit 4 (the January 3, 1986, order of the trial court), the District Court has denied the motion of the University for a stay pending the appeal of its judgment. Although that motion for stay was joined with and contained in the motion of this defendant for an interlocutory appeal under 28 USC § 1292(b), the trial court overruled those motions separately. The reiteration of a motion for a stay in the trial court would be redundant as well as futile and impractical. The stay was denied by the trial court before the § 1292(b) motions were decided.

B. *There is a likelihood that the University shall prevail on the merits of its appeal.*

As set out in the motion of the University seeking an interlocutory appeal under 28 USC § 1292(b) (pp. 3-4, Exhibit 3), the trial court expressly declined to apply, in judging whether the University is liable under Title VI and the Fourteenth Amendment, the holding in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F.Supp. 784 (M.D. Ala. 1968) *aff'd*, 393 U.S. 400 (1969) (see pp. 93-97, Memorandum of Opinion, Exhibit 2). There are significant differences between the affirmative duty to eliminate vestiges of a prior racially dual system espoused in the *ASTA* case and those which may be inferred fairly from the Memorandum Opinion of the trial court.

The *ASTA* holding that the affirmative duty to dismantle a racially dual system on the college level is satisfied by dealing in good faith with admissions, faculty, and staff is grounded in the differences between elementary/secondary schools and universities. Those differences apparently had no significance for the trial court and led it to apply the same legal standards utilized by the courts in the elementary/secondary school cases.

To the extent that the trial court's Order (Exhibit 1) grants relief to the plaintiff United States of America, it represents a departure from the controlling precedent of the Supreme Court of the United States and of this Circuit. The factual findings of the District Court (the Memorandum of Opinion attached hereto as Exhibit (2) do not support a finding of a violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*) or the fourteenth amendment to the Constitution of the United States.

No "program specific" violations of Title VI were identified by the trial court against the University in the administrative proceedings conducted by the United States which led to the filing of the complaint or at trial by the United States. In fact, the findings of the trial court in its Memorandum of Opinion were in some significant areas quite positive as to the conduct of the University in the area of race relations. As the Supreme Court has made clear, enforcement of spending power statutes such as Title VI, requires a narrowly focused, or a "program-specific" approach. See, *North Haven Board of Education v. Bell*, 102 S.Ct. 1912 (1982); and *Grove City College v. Bell*, 104 S.Ct. 1211 (1984). The requirement for such a focused enforcement effort of Title VI has long been the law of this Circuit. The requirements of *Finch v. Taylor County Board of Public Instruction*, 414 F.2d 1968, (5th Cir. 1969), were cited with approval by the Supreme Court in *North Haven*, supra., at 1926.

At the most basic level no individual was identified by the trial court as being denied access to or the benefits of any activity of the University on account of his race. No federal funds were identified by the trial court as being used by the University in a racially discriminatory fashion. Absent such findings, *Grove City* and *Taylor County Board of Public Instruction* will compel reversal.

Additionally, the trial court allowed the United States to bring this action against the University under the fourteenth amendment. Congress has never granted the power to bring such an action to the Attorney General, and absent such an express grant of statutory authority, the Attorney General was (and is) without standing to sue. See, *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). This issue has apparently not been addressed directly by this Circuit, *United States v. Marion County School District*, 625 F.2d 607 (5th Cir. 1980), but in each other circuit which has had occasion to reach the issue, the Attorney General has been denied the right to proceed under the fourteenth amendment, absent direct authorization by Congress. See *United States v. Ernst & Whinney*, 735 F.2d 1296, at 1300, n. 10, (11th Cir. 1984).

Even if the Attorney General had the power to bring this action under the fourteenth amendment, the absence of findings of direct violations on the part of the University would prevent the entry of a finding of liability on its part.

Aside from the claims of the United States, the trial court authorized the two traditionally black public institutions of higher education in Alabama (Alabama State University and Alabama A&M University) to be realigned as plaintiffs and to pursue claims in this action

on their own behalf. The question of whether or not one state agency has the right to sue another under any federal cause of action and whether or not state defendants are entitled to the protections of the eleventh amendment are central issues in the appeal already pending before this Court as Case No. 85-7582, noted earlier. The amicus brief filed by the University in that cause is attached hereto as Exhibit 6.

C. *The University is likely to suffer irreparable injury from a denial of this stay.*

In the absence of any findings that any individual has been denied access or the benefits of any program or activity of the University on the account of his or her race, the disruption and confusion caused by the Order and Memorandum of Opinion of the trial court will greatly impair the University in the maintenance of its programs and in the recruitment and retention of students, faculty, and staff, including black individuals. Attached as Exhibit 7 is an affidavit of Dr. John C. Wright, President of The University of Alabama in Huntsville, which attests to the injury occurring at his campus. The Order required the State to submit a plan by February 14 and permits the other parties to submit comments or objections to the plan within 15 days thereafter and states that the court will schedule a hearing on the plan. Consequently, that process should take a minimum of an additional month and, if the court allows a proper hearing with expert evidence and testimony, it could take from six months to a year. During that time, the findings contained in the Memorandum of Opinion and the plan, however modified through the process, shall communicate grave and significant ramifications to present and future students, faculty, and supporters of the institutions affected and to citizens and public officers involved in the political processes leading, among other things, to appropriation of State operating and capital funds to these institutions. Of course, any

plan ultimately approved by the trial court will have that same effect, but where the underlying findings and legal standards are as strongly disputed, with the likelihood of reversal on appeal, as they are in this case, then the disruption and injury that flow from creating, adopting, and operating under such a plan is unwarranted and unnecessary. A finding that the faculties of the three campuses operated by the University (UA, UAB, and UAH) are racially identifiable signals to prospective black applicants that they may not be welcomed or wanted on those campuses and impairs those campuses in a highly competitive recruitment for the limited number of black faculty applicants who are available.

As to programs at UAH that have been found to be duplicative (e.g., all professional education programs, computer science, etc.) the students and factulty involved in those programs and those who might become employed or enrolled in those programs understandably are reluctant to continue. Those programs have been jeopardized by the findings of the trial court contained in its Memorandum of Opinion. The affidavit of the President of UAH is not inclusive but should be taken by this court to be representative of the situation presented by the liability finding of the trial court.

D. *Neither the plaintiff nor any other parties will be substantially harmed by granting the stay.*

The trial court did not identify in its Memorandum of Opinion any individual who was being subjected to discriminatory treatment based on race by the University or, for that matter, by any other defendant. No student is being denied admission to or participation in any program or activity of the University on account of race and no applicant to the faculty of the University is being denied a job on the basis of race.

The plaintiffs' claims and dispute are essentially institutional claims and questions: whether the U.S. At-

torney General can sue under the fourteenth amendment or bring a Title VI enforcements action in the absence of evidence of program-specific violations; whether one state institution may sue another state institution despite standing requirements and the immunity of the elventh amendment; whether the legal standards of the affirmative duty to desegregate institutions of higher education set out in *ASTA* apply; whether one state institution may sue the State and other state institutions or "reparation" damages arising out of inequitable appropriation of capital and operating funds; and the other questions presented in this case and on this appeal, all of which are "institutional" in nature.

As the affidavit of Dr. John Wright states (pp. 4-5, Exhibit 6), any plan ultimately adopted by the court will require a number of years to implement. Any right or need for relief in this case is not immediate, and even though preferred as violations of civil rights are, they are not of such a nature to demand, and are not capable of receiving, immediately remedy or relief.

E. *A stay will advance the public interest.*

Congress has determined that the public interest is served by requiring the executive branch to focus its enforcement of Title VI on specifically identified discriminatory conduct, in specifically identified institutional activities which receive federal funds. It is also determined that the public interest is served by limiting the power of the Attorney General to bring suit under the fourteenth amendment to those specific circumstances that Congress identifies.

This Court (as the Fifth Circuit) most clearly articulated the hazards of a blunderbuss approach to the enforcement of Title VI:

> HEW was denied the right to condemn programs by association. The statute [Title VI] prescribes a

> policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own 'day in court'.

Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 at 1078 (5th Cir. 1969).

This appeal involves the most fundamental rights of the University. Among the most important of these is the right to be judged according to its own behavior. Absent a stay granted by this Court, the University will be subject to an extraordinarily complex, expensive, and disruptive remedial determination in the complete absence of any evidence or any judicial determination that it has violated any applicable civil rights law in connection with the operation and maintenance of any specific program or activity within the University. In a pluralistic society, it is critical to the best interests of its citizens that courts utilize standards that distinguish between racial compositions of student bodies and faculties that result from prior State-created racially dual systems of public senior higher education and those that result from cultural and other free and fair choices by members of its society. The trial court did not do that and apparently the legal standard it utilized does not favor such a distinction. There is a legitimate and substantial difference between the direction of the *ASTA* court and the legal standards utilized by the trial court. This is the first statewide higher education desegregation case to reach an appellate court involving the comprehensive and statewide issues that will be presented on this appeal.

To proceed to the remedy phase of this case based on the findings contained in the Memorandum of Opinion without clarifying the underlying law will result in disruption, redirection, upheaval, and reallocations of important academic and public service programs and limited resources and assets. In evaluating the possible harm that can come from denying a stay against any that may result from granting the stay appears to be no contest. On that basis, the University respectfully requests that this Court enter a stay of the Order and Memorandum of Opinion and any further proceedings by the trial court thereunder pending the outcome of the appeals filed in this case.

Done this 12th day of February, 1986.

Respectfully submitted,

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES H. SELF, JR.
JOHN CATES

By: /s/ Robert L. Potts
ROBERT L. POTTS
General Counsel

/s/ C. Glenn Powell
C. GLENN POWELL
Associate General Counsel
For The Board of Trustees of
The University of Alabama
401 Queen City Avenue
Tuscaloosa, Alabama 35401
205/348-5121

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR A STAY OF THE DISTRICT COURT MEMORANDUM OF OPINION AND ORDER PENDING APPEAL has been delivered to all parties in this action by depositing a copy of the same in the United States mail, first class postage prepaid, addressed to the following counsel of record all on this the 12th day of February, 1986.

Mr. Ronald W. Wise	Mr. Ira Dement
Mr. Charles Coody	Mr. Joe R. Whatley, Jr.
Mr. John C. Falkenberry	Mr. Solomon Seay, Jr.
Mr. Thomas Thagard	Mr. Edward Allen
Mr. Walter Merrill	Mr. William F. Murray, Jr.
Mr. Frederick Ingram	Mr. Richard F. Calhoun
Mr. Frank Ellis, Jr.	Mr. Carl E. Johnson
Mr. T. Michael Putnam	Mr. Maxey Roberts
Mr. James U. Blacksher	Mr. Donald V. Watkins
Mr. Frank W. Donaldson	Ms. Caryl Privett
Mr. Nathaniel Douglas	Mr. Franz R. Marshall
Mr. Levern M. Younger	Mr. Jay P. Heubert
Ms. Jeanne K. Pettenati	Mr. Mylan R. Engel
Ms. Judith F. Ledbetter	Mr. Armand Derfner

ROBERT L. POTTS
C. GLENN POWELL
STANLEY J. MURPHY
ROBERT W. RIEDER, JR.
CHARLES H. SELF, JR.
JOHN CATES

By: /s/ Robert L. Potts
ROBERT L. POTTS
General Counsel

/s/ C. Glenn Powell
C. GLENN POWELL
Associate General Counsel
For The Board of Trustees of
The University of Alabama
401 Queen City Avenue
Tuscaloosa, Alabama 35401
205/348-5121

EXHIBIT 7

STATE OF ALABAMA

COUNTY OF MADISON

AFFIDAVIT

My name is John C. Wright. I presently am and since 1978 have been the President of The University of Alabama in Huntsville (UAH), one of the universities constituting The University of Alabama System and subject to the management and control of The Board of Trustees of The University of Alabama, a public corporation of the State of Alabama. As President I have general responsibility for the development and operation of UAH and have primary responsibility for the quality of all academic and support programs and the employment of and the conditions of employment for all faculty and other employees of UAH.

In the Memorandum of Opinion dated December 7, 1985, entered on December 9, 1985, and subsequently amended on December 9, 1985, by the United States District Court for the Northern District of Alabama in *U.S.A., et al. v. the State of Alabama, et al.* (Civil Action No. CV-83-C1676-S), the Court found within the State of Alabama and specifically at UAH vestiges of a prior racially dual system of higher education. Among other findings affecting UAH, the Court found that the undergraduate and graduate teacher education and certification programs offered at UAH unnecessarily duplicate similar and older programs offered at Alabama A & M University, a predominately black university located in proximity to UAH (Memorandum of Opinion, p. 66) and that certain programs in computer science at UAH unnecessarily duplicate those at A & M and reduced white enrollment at A & M (Memorandum of Opinion, p. 67). The Court also found that the student body of UAH and its faculty are identifiable by race (Memorandum of

Opinion, p. 91). UAH, of course, does not believe these findings are supported by the evidence nor form a sufficient basis for a finding of liability under applicable law.

By an order dated December 7, 1985, entered on December 9, 1985, and amended on January 17, 1986, the Court ordered the State of Alabama, George C. Wallace, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority to submit to the Court, not later than February 14, 1986, a plan to eliminate all vestiges of the dual system of higher education in Alabama. The Board of Trustees of The University of Alabama has appealed this order to the United States Court of Appeals for the 11th Circuit.

I am of the opinion and this affidavit is given in support of the position that UAH will likely suffer irreparable injury from a denial of a stay of the proceedings in the District Court until the liability matters can be settled on appeal, that the other parties to this action will not be substantially harmed by granting the stay and that the public interest will be advanced if this stay is granted.

First, the liability order of the Court has placed a cloud over the recruitment of students, faculty, and other staff and over the continuing vitality and attractiveness of the programs found to be duplicated and, in general, all of the program offerings of UAH. I continue to feel that UAH is operating within the letter and spirit of Title VI of the Civil Rights Act of 1964 and the 14th Amendment of the U. S. Constitution and that if legal standards previously applied in the 11th Circuit (old 5th Circuit) but expressly rejected by the trial court in this case were to be utilized in determining liability, UAH and its programs shall be found to be in compliance with the law.

Honest and good faith proposals of settlement which have become public have had a negative impact on the morale of the faculty and students at UAH and on the

ability of UAH to attract new faculty and students. Some of the proposals for remedy have suggested program transfers and closures at UAH. The present and prospective faculty and students in those areas are not likely to maintain the interest and dedication required for populated, successful, quality programs.

Certainly any plan submitted by the State will have a even greater effect in that regard because unlike settlement proposals it has at least central state government acceptability. Finally, a plan approved by the trial court will have a definite and unquestionable impact in that regard. If UAH is correct in its innocence or is correct in any substantial portion of its defense on appeal, then a different remedy will be drawn that perhaps may be less disruptive. However, by that time, the damage to the future of UAH, the regional and national image of its programs, and its general viability and potential will have occurred.

Any adverse remedial order concerning UAH programs will, by virtue of its issuance, undermine the viability of those programs. As I have said, that is already the case but it will be an even greater concern in the period of time between the promulgation of the remedy order and the final resolution of this case on appeal. Even assuming that implementation of the remedy may be stayed pending appeal, the programs will likely suffer irreparable harm because of the cloud of uncertainty created by the lower Court's remedy ruling.

Under the shadow of the Memorandum of Opinion and certainly under that of a remedy ruling, faculty and student recruitment and retention are seriously impaired. The securing and allocation of resources for the programs of UAH in the form of gifts, grants, and contracts will be disrupted.

UAH has already experienced some of these difficulties as a result of challenges to the programs by the plaintiffs

during the trial. The effect of a court order closing, transferring, or limiting any of these programs would impact them prospectively in an even more damaging way. The loss of faculty, students, and resources diverted from these programs would in a large measure be irretrievable and could not be reversed or rectified by a successful appeal. These inimical consequences are unnecessary and can be avoided by deferring the remedy phase of the litigation until the liability matters are settled on appeal.

At the same time, neither the plaintiffs nor any other parties in this action will be substantially harmed by granting the stay. Even if the vestiges found by the Court are upheld by the appellate court, their continuation during the appeal will not substantially harm any other parties. The liability findings of the Court were not so egregious that immediate relief is demanded. In fact, any plan adopted to deal with those findings will certainly take a matter of years to remedy, and some will take a lot longer. Certainly it will be more beneficial to all students and faculty in the public senior institutions of higher education in the State of Alabama to operate with certainty. To undertake one remedy plan only to find it drastically changed on appeal would be disruptive and wasteful to all students, faculty, and the taxpayers of the state. The citizens of the state are entitled to clarity and definition as they witness and choose to support or reject the concepts embodied in a remedy plan.

/s/ John C. Wright
JOHN C. WRIGHT

Sworn to and subscribed before me on this the 11th day of February, 1986.

My Commission expires:

7/17/88

/s/ Mary Layton Owens
Notary Public in and for the
State of Alabama, at large.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Office of the Clerk
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

June 11, 1986

MEMORANDUM TO ALL COUNSEL:

No. 86-7090 United States of America, et al -v-
The State of Alabama, et al

D.C. # CV83-1676-S

Dear Counsel:

The record on appeal has been filed in the above referenced case—see enclosed memorandum. There are 180 volumes of record.

The pleadings are in Volumes I through 33 and numbered 1 through 626. The documents circled are the ones that have been included in the record.

The transcripts are in Volumes 34 through 99 and are so identified in the left margin.

The discovery pleadings are in Volumes 100 through 180 nad (sic) have been assigned x numbers—1x through 1297x. They are not circled but upon review, the only missing discovery documents are 1065x, 1090x, 1091x, 1097x, 1100x, 1106x, 1272x, 1279x, 1280x, 1281x and 1283x.

Depositions are filed as exhibits and are identified by a check mark and EXH in the left margin. In addition there are 33 boxes of exhibits and a large map.

Because of the large record and numerous parties, the briefing schedule is being enlarged. A suggested time schedule is 55 days for appellants, 45 days from date of service for appellees, and 25 days from date of service for reply briefs.

All counsel are requested to review the enclosed docket sheet, memorandum and the proposed briefing schedule and advise me *no later than June 18, 1986.*

Sincerely,

SPENCER D. MERCER
Clerk

By: /s/ Sharon Evans
Deputy Clerk

Enclosures

UNITED STATES COURT OF APPEALS

Memorandum

Date: June 11, 1986

To: Counsel of Record

From: Clerk's Office

Subject: 86-7090-USA, et al -v- State of Alabama, et al
Record on Appeal

The record on appeal in the above reference case consists of the following:

Pleadings —Volumes 1 through 33
(Document Numbers 1 through 626)

Transcripts—Volumes 34 through 99

Discovery —Volumes 100 through 180
(Document Numbers 1x through 1297x)

Exhibits —Thirty three boxes plus large map

Depositions—Filed as exhibits
Identified by check marks on District Court docket sheet and EXH in margin

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors, Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(June 6, 1986)

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

JOHNSON, Circuit Judge:

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these is-

sues were severed from the main state-wide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

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[1] In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle*

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are potential subdivisions of a state" are "creatures of the state, and possess no

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School District No. 1, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line—including *Safety Harbor, supra*—and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound

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[2] *Cf.* City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with Board of Education v. Allen, 392 U.S. 236 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1982); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), for an indication of the confusion surrounding this issue.

by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra,* at 441 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1051 n.1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

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[3] By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. City of Oklahoma City v. Tuttle, —— U.S. ——, 105 S.Ct. 2427, 2432 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge,

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[4] *See also* Commonwealth of Pa. v. Porter, 659 F.2d 306, 327 n.3 (3rd Cir. 1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983 . . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5] Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-488 n.31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, at 479-482.

no court has decided this issue.[6] We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Hardin*, 106 S.Ct. 530 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicity recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its

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[6] We note that at least five justices determined in University of California Regents v. Bakke, 438 U.S. 265, 287 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* at 281.

[7] *See* Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1978).

members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, —— U.S. ——, 105 S.Ct. 3099, 3106 n.14 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, at 3107 n.17; *Quern v. Jordan*, 44 U.S. 332 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's

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[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Hans v. Louisiana, 134 U.S. 1 (1890), established that the amendment also proscribes suits by citizens against their own state.

[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive

immunity by naming state officials as defendants. *Graham, supra*, at 3107 n.18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court had indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* at 3106 n.14; *Brandon v. Holt*, 105 S.Ct. 873, 877 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra*, at 694.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

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relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302 (5th Cir. 1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1353 (11th Cir. 1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n.7 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have

been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges

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[10] To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. Johnson v. United States Department

findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services*, 105 S.Ct. 249 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education progams if left un-

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of Agriculture, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

> redressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, —— U.S. ——, 105 S.Ct. 1504 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard the argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

Analysis of Appropriat

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	Ala. Act No. 82-568 FY 1982-83		Ala. Act No. 83-753 FY 1983-84	
	Dollars	% of Sen. Inst. Total	Dollars	% of S Ins Tot
Alabama A & M	10,002,240	3.48	10,077,011	3.
Alabama State	8,524,347	2.96	8,702,976	2.
Athens State	1,980,646	0.69	2,025,676	0.
Auburn	44,861,189	15.59	45,449,983	15.
AES/CES	19,137,732	6.65	19,542,207	6.
AUM	7,312,868	2.54	7,414,534	2.
Jacksonville	12,376,421	4.30	12,626,227	4.
Livingston	4,145,116	1.44	4,218,680	1.
Troy	9,638,740	3.35	9,975,130	3.
UA	46,049,629	16.00	46,982,677	16.
UAB	69,676,355	24.22	70,701,053	24.
UAH	13,368,427	4.65	13,686,670	4.
Montevallo	6,475,129	2.25	6,617,048	2.
North Alabama	8,218,692	2.86	8,795,617	3.
South Alabama	25,972,713	9.02	26,112,352	8.
TOTAL	287,740,244	100.00	292,927,841	100.

* This figure does not include $1,000,000 appropriated to UAB for a Center for Biomedical Engineer Studie

ions from the Alabama Special Education Trust Fund
for 14 Senior Institutions
FY 1982-83 through FY 1986-87

	Ala. Act No. 84-330 FY 1984-85		Ala. Act No. 85-516 FY 1985-86		Ala. Act No. 86-622 FY 1986-87			
n.	Dollars	% of Sen. Inst. Total	Dollars	% of Sen. Inst. Total	Dollars	% of Sen. Inst. Total	5-Year % Increase	2-year % Increase
5	11,147,149	3.09	14,486,787	3.16	15,146,533	3.67	51.45	35.90
7	10,904,540	3.03	14,391,794	3.14	14,958,253	3.63	75.48	37.17
9	2,499,114	0.69	3,323,804	0.73	2,715,421	0.66	37.10	8.66
2	57,226,570	15.88	72,705,128	15.88	65,370,303	15.85	45.72	14.23
7	24,560,454	6.81	30,927,163	6.75	28,155,318	6.83	47.12	14.64
3	9,527,330	2.64	12,838,636	2.80	10,791,519	2.62	47.57	13.27
1	14,203,940	3.94	18,594,646	4.06	15,839,657	3.84	24.98	11.52
5	4,788,850	1.33	6,664,948	1.46	5,315,815	1.29	28.24	11.00
1	12,324,850	3.42	16,851,867	3.68	14,809,138	3.59	53.64	20.16
5	58,007,740	16.09	72,906,803	15.92	64,739,132	15.70	40.59	11.60
5	87,275,930	24.21	106,388,359*	23.24	97,162,640	23.57	39.45	11.33
7	17,678,240	4.90	23,145,365	5.06	20,626,723	5.00	54.29	16.68
5	7,953,573	2.21	10,382,210	2.27	8,751,972	2.12	35.16	10.04
0	10,716,180	2.97	13,976,061	3.05	12,030,259	2.92	46.38	12.26
1	31,619,690	8.79	40,287,129	8.80	35,889,052	8.71	38.18	13.50
0	360,434,150	100.00	457,870,700	100.00	412,303,735	100.00	43.29	14.39

o the Alabama Commission on Higher Education which was later transferred

DEFENDANT'S EXHIBIT UAS #1034

REPORT TO AUBURN UNIVERSITY, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JACKSONVILLE STATE UNIVERSITY, AND THE UNIVERSITY OF SOUTH ALABAMA

FACILITY MANAGEMENT INSTITUTE
A division of Herman Miller Research Corporation

REPORT TO AUBURN UNIVERSITY, THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JACKSONVILLE STATE UNIVERSITY, AND THE UNIVERSITY SOUTH ALABAMA

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* * * *

Methodology for the review

In this review, there are two basic questions. First, which institutions of public higher education need to be evaluated? Second, how is the evaluation to be undertaken? This section will address these issues.

Institutions Reviewed

Alabama has fourteen public-supported higher education institutions offering baccalaureate degrees. They are:

Alabama A&M University
Alabama State University
Athens State College
Auburn University
Auburn University at Montgomery
Jacksonville State University
Livingston University
Troy State University
University of Alabama
University of Alabama at Birmingham
University of Alabama in Huntsville
University of Montevallo
University of North Alabama
University of South Alabama

In the original civil rights litigation brought by the United States government, all of the above institutions were defendants. However, the two predominantly black institutions, Alabama A&M University and Alabama State University, requested and received permission to join with the prosecution. Thus, from a legal standpoint, these two predominantly black institutions are in an adversarial position with the other institutions.

The basic problem is to identify the appropriate peer institutions to the predominantly black institutions for review purposes. Only in this way can the resulting study be valid.

There are seven institutions within the fourteen that constitute a valid comparative group. They are:

Alabama A&M University
Alabama State University
Auburn University at Montgomery
Jacksonville State University
Troy State University
University of Alabama in Huntsville
University of North Alabama

These institutions share: 1) a common governance and history as teachers colleges, or geographic proximity; 2) similar enrollment attributes in terms of total enrollment and graduate and undergraduate emphases; 3) similar programs and highest degree levels. The appropriateness of this grouping can be confirmed by referring to national classification systems and by examining key information about the institutions themselves. For further discussion on the selection of these institutions as a peer grouping, refer to Appendix A.

* * * *

SUMMARY AND CONCLUSIONS

The purpose of this study was to answer the question: Do vestiges of a dual system of higher education still remain in the State of Alabama in the area of facility resource allocation and management? To analyze this question, a five-part study was undertaken.

First, the state process—its workings, allocation, and projects—was reviewed. This portion of the study focused on the capital outlay process and the capital funding allocations from 1965 to 1981, and reviewed the project records of the Alabama Building Commission.

Second, using three "snapshots" from the years 1958, 1965-66, and 1968 an attempt was made to establish the level of facilities at each of these peer institutions.

Third, for the period of 1976 to 1982, a number of space categories at the seven peer institutions were compared. These space categories were classrooms, laboratories, offices, library and study space, general academic and administrative space, and nonresidential space.

Fourth, the campus visits permitted the reviewing team to assess the development strategy (which correlates with the earlier project review), the quality of maintenance, and the campus environment. Finally, an overall measure of facility quality and institutional competition is assessed for these institutions.

In the fifth section, the conclusions reached in the individual sections are summarized. The issue of the existence of vestiges of a dual system in the area of facility resource allocation and management is addressed.

The State Process: Its Workings, Allocations, and Projects—Conclusions

The review of the capital outlay process in the state of Alabama included the following statement on philosophy of operation:

> Insofar as the institutions of higher education are concerned, each has a board that is charged with managing the institution. The board therefore hires presidents and other officers and staff to carry out the work of the institution. Hence, the role of the state is simply to provide funds for these institutions and "get out of the way" so that the individual management can operate the institution in the most effective and appropriate way.

There are three important implications of this philosophy of operation:

First, each institution is required to manage its capital resources and capital development with minimal involvement by the state of Alabama. Thus, the state process can be regarded as a *non-intervention* type, leaving the institution free to move in whatever development or improvement direction it believes desirable at a particular time.

Second, the process neither rewards nor punishes. An institution's aggressiveness in fund raising does not lead to increased state capital funding. Thus, there is no reward for such activity. On the other hand, failure to expend money already allocated does not disqualify an institution from receiving its share of subsequent allocations. Thus, Alabama A&M continued to receive new allocations even though significant monies from earlier allocations remained unspent.

Third, it should be evident that the burden of management responsibility for virtually everything that occurs in the area of capital outlay rests with the institution. The institution is free to raise outside funds, maintain its facilities in whatever condition desired, and plan buildings to its own specifications. Thus, the responsibility for maintaining and developing facilities rests almost exclusively with the institution.

Capital Allocations

If one focuses on the five former teachers colleges contained in this peer group of seven institutions, it is evident that Alabama State University and Alabama A&M have benefited from the state capital allocations. In almost every measure, their allocations have surpassed those of their teacher-college colleagues.

Auburn University at Montgomery and the University of Alabama in Huntsville also did well in capital allocations. However, it must be remembered that Auburn University at Montgomery had no campus and no facilities at the start of this period and the University of Alabama in Huntsville had only limited facilities in place at that time. Thus, the dollars allocated for these institutions included the extensive "start-up" costs necessary to establish an institution.

Since Alabama A&M and Alabama State University had well-developed physical plants in 1965, the additional capital allocations over this period (1965-1981) should have given these traditionally black institutions a distinct advantage over their proximate colleagues.

Projects

Working solely with the project records published by the Alabama Building Commission, a number of interesting observations can be made.

First, it is possible to infer a development strategy for each of these institutions. It appears from this project record that Alabama A&M University, Auburn University at Montgomery, and the University of Alabama in Huntsville all rely on new construction as the driving force of their development programs. This is understandable at Auburn University at Montgomery and at the University of Alabama in Huntsville. It is not so easily understood at Alabama A&M University because of the extensive physical plant developed prior to 1965.

Jacksonville State University, Alabama State University, and the University of North Alabama all emphasize a combination of new construction and renovation. While the precise balance between these two dimensions varies from one institution to another, it represents a middle of the road position.

The project record shows that Troy State uses state monies for many relatively minor capital projects, in addition to major renovation and new construction.

Jacksonville State University is notable among the seven institutions for its use of non-APSCA funding. It is evident from the project record that the library, business administration building, nursing building, and new physical education facility were all constructed with non-APSCA funds.

Three Historic Snapshots

Three historic snapshots were used to describe the facility picture during the earlier years of this time period.

The first of these "snapshots" was taken from a report issued in 1958 by the Alabama Education Study Commission. The report provides information on the utilization of classroom and laboratory facilities as well as information on the extent of and need for replacement of both nonresidential facilities and the residential facilities.

In 1968 the Alabama Education Study Commission issued another report dealing with the decade ahead. The capital needs for each institution for the next decade are reported. The projection of needs is based on work done at the institution plus testimony from the president.

The 1965-66 records of the state insurance fund were reviewed to note the value of the academic plant insured by each institution at that time. Since the institution pays a premium for all the buildings insured there is no reason to overstate the value of the buildings. Because this same fund provides the dollars necessary to replace buildings

lost by fire or damaged, there is an incentive to accurately report replacement value.

The above three snapshots constitute interesting glimpses of the facilities situation in Alabama during this decade. While these snapshots do not provide conclusive evidence of faculty equivalence among the seven institutions, they strongly suggest that such a facility equivalence was indeed the case.

1976-82 Space Comparisons

These comparisons were made on classrooms, laboratories, offices, library and study space, general academic and administrative space (a summary of the first four categories), and total nonresidential space.

While all seven campuses have the capacity to serve more students than they presently do, Alabama State University and Alabama A&M University still compare favorably to the other institutions in these measures. No sense of facility gap or deprivation exists for either of these institutions.

The Institutional Review

Campus Visitation

The institutions were judged on the basis of: development strategy, maintenance and custodial care, overall campus environment, and a total competitive assessment.

Development Strategy

Generally, the conclusions reached through a review of the project record were confirmed through the campus visits.

Alabama A&M University does indeed emphasize new construction, often neglecting the renovation and renewal of its older facilities.

The University of North Alabama, Alabama State University, and Troy State University all use new construction and renovation or renewal to develop their institutions.

Jacksonville State University has been the most successful of these institutions in securing outside funding. Yet facility problems exist. The imposing new structures constructed at Jacksonville State are not consistently well planned and well located.

As new institutions, Auburn University at Mongomery and the University of Alabama in Huntsville constructed new facilities and also pursued an incremental development strategy. In each case, expansion of the physical plant kept pace with enrollment growth. However, the University of Alabama in Huntsville has apparently departed from that sound strategy with its most recent new facility.

Maintenance and Custodial Care

Alabama State University, the University of North Alabama, the University of Alabama in Huntsville, Auburn University at Montgomery, Jacksonville State University, and Troy State University all have good programs of maintenance and custodial care that are essentially equivalent. Differences observed in the programs can be explained by the timing of the visit rather than by the quality of these services.

However, the situation at Alabama A&M University presents a special case. Maintenance and custodial care are not performed equally throughout the campus. Thus, some structures seem well cared for while others seem neglected.

Campus Environment

While Alabama State University, Troy State University, and the University of North Alabama all have unique

features, the campus environment at each of these institutions presents a compact, collegiate atmosphere. In all three cases, the campuses are pedestrian oriented and pleasant places to be. However, Alabama State University and the University of North Alabama would face problems in expanding their campuses due to the lack of available land.

Alabama A&M, when viewed from a distance, is the most impressive of the seven campuses. A closer look reveals a variety of problems. The effect of both the maintenance problems and development strategy is evident in the apparent existence of two levels of quality among the buildings. The near derelict Domestic Science Building, the vacant Councill Hall, and the need for improved roads all help to create a campus environment far below its potential.

Jacksonville State University is divided by a major highway. This difficulty is further complicated by the development strategy followed by the institution. As a result, the campus does not function as well as others.

Auburn University at Montgomery looks like the commuter institution of higher education that it is. The grounds and buildings are well designed but the overall result is quite impersonal.

The University of Alabama in Huntsville, with its sprawling campus, is in some respects, oriented more to the automobile than to the pedestrian.

Facilities and Institutional Competition

It is judged that the facilities of the following institutions are "competitively effective": Alabama State University, Auburn University at Montgomery, Jacksonville State University, Troy State University, the University of Alabama in Huntsville, and the University of North Alabama.

The problem at Alabama A&M University seems to be in its ability to manage facilities. If the class assignment

practices witnessed during the visit to the campus are typical, this alone would place Alabama A&M University at a disadvantage. Further, the tendency to build comprehensive new facilities while neglecting needed renewal and renovation poses problems. Finally, the uneven level of maintenance exacerbates the other problems.

Surprisingly, Alabama A&M still has substantial unexpended funds available at APSCA—some of it dating back to the 1973 allocations. As of spring 1984, the 1981 oil windfall money was unspent. Thus, while the facility situation at Alabama A&M is troublesome, it must be attributed to the facility management policies and practices of the institution itself.

Conclusion

This investigation clearly establishes the conclusion that no vestige of a dual system of higher education exists in the State of Alabama in the area of facility resource allocation and management. Where problems exist on any campus, they are the result of the facility management practices of the institution and not the result of the state process.